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A View to the Future of Judicial Federalism: "Neither Out Far Nor in Deep"

Thomas E. Baker

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ARTICLES

A VIEW TO THE FUTURE OF
JUDICIAL FEDERALISM: "NEITHER
OUT FAR NOR IN DEEP"

Thomas E. Baker[†]

I.	AN INTRODUCTION TO FUTURISTS AND FUTURISM	707
II.	THE FUTURE OF THE STATE COURTS	715
	A. <i>More Cases</i>	715
	B. <i>Fewer Resources</i>	719
	C. <i>State Constitutional Law</i>	735
	D. <i>State Court Futures Activities</i>	738
III.	THE FUTURE OF THE FEDERAL COURTS	741
	A. <i>Federalization</i>	742
	1. NAFTA/GATT	745

[†] Alvin R. Allison Professor of Law, Texas Tech University; B.S. cum laude, Florida State University, 1974; J.D. with High Honors, University of Florida, 1977.

This article was prepared as a background paper for the author's oral presentation at the Middle-Atlantic State-Federal Judicial Relationships Conference, held in Williamsburg, Virginia on November 14 & 15, 1994. The author and the editors have sought to preserve the tone and voice of the paper, so that it will read more like a speech. It was researched and written in September 1994, and remains very much a work in progress; a grant application currently is pending with the State Justice Institute to develop this paper into a monograph.

2.	Violent Crime Control and Law Enforcement Act of 1994	748
3.	Health Care	755
4.	A Federal Products Liability Law	759
5.	Statutory Overrulings of the Supreme Court	760
B.	<i>Jurisdiction, Procedure and Organization</i>	762
1.	Federal Questions	763
2.	Diversity Jurisdiction	765
3.	Habeas Corpus	769
4.	The End of the Rule of Concurrent Jurisdiction	773
5.	Federal Procedural Rules	779
6.	Personnel	782
7.	Structural Fatigue	785
C.	<i>A Postscript</i>	787
IV.	JUDICIAL FEDERALISM INITIATIVES IN THE FUTURE	789
A.	<i>The Theory of Judicial Federalism</i>	790
B.	<i>Judge-to-Judge Initiatives</i>	793
C.	<i>Court-to-Court Initiatives</i>	797
D.	<i>Judiciary-to-Judiciary Initiatives</i>	800
1.	Organization	801
2.	Relations with the Political Branches	804
3.	Mobilizing "Friends of the Courts"	808
a.	The Bar	809
b.	The Academy	810
c.	The Public	814
E.	<i>A Postscript on Judicial Federalism Initiatives</i>	818
V.	CONCLUSION	818

*The people along the sand
All turn and look one way.
They turn their back on the land.
They look at the sea all day.*

* * *

*They cannot look out far.
They cannot look in deep.
But when was that ever a bar
To any watch they keep?*

ROBERT FROST¹

I. AN INTRODUCTION TO FUTURISTS AND FUTURISM

Futurism has become a big business. There have been best-selling books and sequels in which the authors foretell the future.² It seems as if every Fortune 500 company has created a futures division, or at least brought in futurist consultants, and American universities now offer degrees with an emphasis in futures studies.³ Long-range planning certainly is in vogue throughout the governmental sector.⁴

There are any number of plausible explanations for these developments, including the increased uncertainty from such world events as the fall of European communism and an economic ambition to participate in the globalization of the economy. Futurism and futurists have arrived. I think this probably has a lot to do with the fact that the next millennium is less than a decade away. Indeed there was no shortage of predictions for the future the last time we approached a new century. In 1893, for example, one prominent futurist of that era confidently predicted that during the

1. ROBERT FROST, *Neither Out Far Nor In Deep*, in COMPLETE POEMS OF ROBERT FROST 394 (1949).

2. See, e.g., JOHN NAISBITT, MEGATRENDS (1982); JOHN NAISBITT & PATRICIA ABURDENE, MEGATRENDS 2000 (1990); ALVIN TOFFLER, FUTURE SHOCK (1970); ALVIN TOFFLER, POWERSHIFT (1990); ALVIN TOFFLER, THE THIRD WAVE (1980).

3. Jack Fischer, *The Study of the Future is Big Business*, PHILADELPHIA INQUIRER, July 11, 1993, at A5.

4. See, e.g., Thomas E. Baker, *Some Preliminary Thoughts on Long-Range Planning for the Federal Judiciary*, 23 TEX. TECH L. REV. 1 (1992) (discussing and analyzing efforts at long-range planning in the federal courts).

20th century all war would be abolished and "[M]an will grow wiser, better and purer."⁵

I must admit that I find all this intriguing.⁶ I also must confess that a lot of what I read that passes for futurism strikes me as more akin to science fiction.⁷ Even futurists themselves will tell you that the best futurists, the most helpful futurists, do not actually attempt to predict the future. Instead, they offer alternative scenarios, describing different possible futures.⁸ These hypothetical scenarios, however, tend to extremes of optimism or pessimism. I think this is a professional hazard of futurists. Who wants to hear that the future is going to be more of the same? Predictions of profound change, for the better or for the worse, garner consulting fees and book royalties.⁹

I do not pretend to have a crystal ball to see into the future.¹⁰ A major difficulty I had preparing this paper is that I am not a

5. Mike Robinson, *A Futurist Group's Forecasts for '90s Fell Wide of the Mark*, PHILADELPHIA INQUIRER, May 23, 1993, at A6. See Maurice Rosenberg, *The Federal Courts in the 21st Century*, 15 NOVA L. REV. 105, 105 (1991) (stating that "[i]n forecasting the future, one should undoubtedly pick a target date far enough ahead to assure that mortality will get there first.").

6.

[T]ime is of special interest to the inquiring minds of the men and women of our epoch because the socioeconomic, ecological, and ideological crises characteristic of the end of the twentieth century are, in a fundamental way, time-related. Specifically, they arise from the time-compactness of our lives and/or derive from and shape certain changes in peoples' assessments of the relative importance of future, past, and present.

J.T. FRASER, OF TIME, PASSION, AND KNOWLEDGE—REFLECTIONS ON THE STRATEGY OF EXISTENCE at xv (2d ed. 1990).

7. See, e.g., Isaac Asimov, *The Next 70 Years for Law and Lawyers*, 71 A.B.A. J. 57, 58 (1985) (predicting the elaborate role computers will play in the future of the justice system).

8. Rushworth M. Kidder, *Futurists Focus on Perspective, Not Prophecy*, CHRISTIAN SCI. MONITOR, July, 31, 1989, at 13 (citing remarks made by Joseph F. Coates at the sixth general assembly of the World Future Society).

9. Prominent futurist Alvin Toffler has observed, "I believe futurists tend to be apocalyptic or wildly optimistic. Life doesn't come that way; it's bittersweet. It's filled with horrible complexity and problems and all sorts of good things, too." See Ellen Creager, *What's Next? Futurist Alvin Toffler Updates His Predictions of "Future Shock"*, DETROIT FREE PRESS, June 21, 1989, at 1B (reviewing Toffler's predictions).

10. Chief Justice William H. Rehnquist, *Seen In a Glass Darkly: The Future of the Federal Courts*, Address at the Kostenmeier Lecture, University of Wisconsin Law School, in 1993 WIS. L. REV. 1 ("Predicting the shape and size of the federal judiciary in the future requires us to gaze into a rather clouded crystal ball. . . ."). Indeed, it is my belief that the "farther one gazes into the crystal ball the more likely one is destined to dine on ground glass." Baker, *supra* note 4, at 7.

futurist and I do not much believe in futurism. Predicting future changes in institutions as complex as the state and federal courts is fraught with difficulty and nuanced further by the elaborate interactions between the two judicial branches. We cannot expect their joint future to be any more linear than their past has been. Political decisions and public policy compromises in the fifty state legislatures and in Congress will shape the courts' futures, not rational discourse at judicial conferences or comprehensive studies in law reviews.

The nineteenth century French traveller and commentator, Alexis de Tocqueville, observed that every social issue in this country eventually becomes a legal issue for the courts.¹¹ At the end of the twentieth century, social scientists will tell you that the nature and number of disputes brought into courts are determined by social trends.¹² The one overriding consensus among courts futurists today is that "the quality of justice in the United States is at risk at the same time that social and economic conditions are changing rapidly."¹³ In short, state and federal courts are in extremis and the crisis promises to continue for the foreseeable future. This is the conclusion of the two most recent and most important studies of the courts' futures.

In 1989, Georgetown University conducted the "Delphi Study," an intensive and comprehensive study of the opinions of forty prominent experts—judges, administrators, scholars, writers, and practitioners—about the future of the *state* courts.¹⁴ The participants, who collectively had nearly 1200 years experience in judicial matters, each provided a detailed written analysis along with a personal interview for the compilation.

In that same year, the Federal Courts Study Committee hired the prestigious Hudson Institute to predict the trends that would affect the *federal* courts.¹⁵ The predictions relied on data from the Bureau of Census and the Bureau of Justice Statistics, reports from

11. "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (George Lawrence trans. & J.P. Mayer ed., 1969).

12. Franklin M. Zweig et al., *Securing the Future for America's State Courts*, 73 JUDICATURE 296, 302 (1990) [hereinafter Delphi Study].

13. *Id.* at 297.

14. *Id.* at 296. See also Edward B. McConnell, *Managing Courts: What Does the Future Hold for Judges?*, JUDGES' J., Summer 1991, at 9, 9-10 (discussing and analyzing the Delphi Study).

15. HUDSON INSTITUTE, *TRENDS AFFECTING THE FEDERAL COURTS* (Oct. 1989).

the Rand Institute for Civil Justice, congressional hearings and various other government reports and documents, interviews with relevant experts, and scholarly literature.

The methodology of each study was state of the art. Both studies sought to predict trends over the next thirty years, roughly through the year 2020. Their conclusions have been confirmed by numerous other futures studies about courts.¹⁶ The following is what the Delphi study and the Hudson Institute study predicted about the future of the state and federal courts.

Demographic changes will be pronounced.¹⁷ Population in the United States will increase by about thirty million, although the rate of growth will be slow and will begin to decline. Since the basic workload of courts is greatly a function of total population, if everything else were constant, workload would slowly increase and then level off.

The population trends, however, are more complicated, as are the effects on court caseloads.¹⁸ The composition of the population will change significantly, with resulting impact on court dockets. First, the population will become older, as the baby-boom generation approaches retirement. More people will be older and living longer. Therefore, issues related to the elderly such as social security, pensions, health care, and death and dying, will become more salient politically as well as judicially.

Second, the nation's racial composition will change. Differences in birth rates among racial groups and the effects of immigration will result in proportional increases in the percentages of nonwhite ethnic and racial groups. Immigrants also tend to be younger on average than the rest of the population, so we might experience some racial tensions along generational lines. With greater numbers of minorities entering the workplace, the courts can expect increas-

16. See Lars Fuller & Craig Boersema, *Judging the Future: How Social Trends Will Affect the Courts*, 69 DENV. U. L. REV. 201 (1992) (identifying major social trends and predicting their impact on the courts); Panel Discussion, *The Changing Face of America—How Will Demographic Trends Affect the Courts?*, 72 JUDICATURE 125 (1988) (reviewing demographic trends and their possible effect on the courts).

17. See HUDSON INSTITUTE, *supra* note 15, at 1-5 (describing the dramatic demographic changes that are expected); Delphi Study, *supra* note 12, at 299-302 (discussing major societal trends and their impact).

18. See Wolf Heydebrand & Carroll Seron, *The Rising Demand for Court Services: A Structural Explanation of the Caseload of U.S. District Courts*, 11 JUST. SYS. J. 303 (1986) (highlighting changes in U.S. district court caseloads and the variables contributing to those changes).

es in cases dealing with equal opportunity and discrimination issues over business practices and wages.¹⁹ Concomitantly, as more women enter the workforce, the courts can expect increases in litigation involving related issues such as sexual harassment and disparity in compensation.²⁰ These will include individual as well as class action suits. Beyond the workplace and school environments, greater multicultural diversity likely will place uncertain strains on the judicial system as diverse groups work out their differences in the larger society. Traditions from other cultures are sure to conflict with our civil and criminal norms, and the courts will be expected to reconcile them.²¹ The administrative burden of providing court services to non-English speaking peoples will increase.²² Economic woes will add more litigation over employment rights. The shift from a smokestack economy to a service industry and information-based economy will have huge unsettling effects on businesses and workers in transition. We can expect more litigation over workplace safety issues and job security issues.²³ Third, as the risks against the institution of the family continue and the poverty cycle expands and deepens, courts will be faced with more cases raising such familiar issues as juvenile delinquency and welfare administration.²⁴ Finally, the AIDS epidemic will further complicate public policy decisionmaking as courts are called upon to resolve disputes over resource allocations and the availability of treatment.²⁵ Legislative initiatives on these is-

19. Fuller & Boersema, *supra* note 16, at 219.

20. *Id.* at 214.

21. Consider the following real examples. In Los Angeles, a Japanese woman attempted a parent-child suicide in the traditional manner called *oyaku-shinju* because of her humiliation over her husband's marital infidelity. Joseph Tybor, *Eye of Newt, Wool of Bat: Is This What the Future Holds for American Courts?*, CHI. TRIB., Aug. 21, 1988, at 4. The woman was rescued, but the children died. She pled guilty to manslaughter and was placed on probation with psychiatric treatment. *Id.* Also in California, a Laotian Hmong tribesman acted out a traditional custom called *zij poj niam*, amounting to marriage by capture of an assimilated Hmong woman. *Id.* He was charged with kidnapping and rape, but negotiated a plea for false imprisonment, with a limited jail sentence and a fine in reparation to the victim. *Id.*

22. William E. Davis, *Language and the Justice System: Problems and Issues*, 10 JUST. SYS. J. 353, 353 (1985).

23. Fuller & Boersema, *supra* note 16, at 210-11 (noting that productivity gains from advanced technology may come "at the expense of laborers").

24. *Id.* at 216 (warning that crime will substantially threaten family living); see Delphi Study, *supra* note 12, at 299-300 (citing weakening family structure, poverty cycles, and children in poverty as important trends).

25. See Fuller & Boersema, *supra* note 16, at 224-25; Delphi Study, *supra* note 12, at 300 (including the long-term effect of AIDS in a discussion about health trends).

sues will generate substantial litigation.

Another set of factors is less connected to demographics. Abstract considerations such as political, social, and economic factors obviously have an effect on court dockets.²⁶ These can best be evaluated separately for their effect on criminal and civil caseloads.

The criminal caseload can be expected to increase simply as a result of the increase in population. Of more significance, however, will be the continued trend on the part of legislatures to criminalize behavior and the proclivity on the part of prosecutors to prosecute more offenders. Both these trends are well-documented and expected to continue. Consequently, the number of criminal cases will increase even among those crimes whose percentage of the total is decreasing. Some categories of crimes will continue to increase dramatically. The most important factor on the criminal docket, of course, is the "war on drugs." Indeed, many in the judicial branches have expressed concern that the courts will be an unintended casualty of this "war."²⁷ You do not have to be a futurist to predict that the drug caseload has become and will continue to be "intractable" and that it will "persist, expand, and gain momentum well into the twenty-first century."²⁸ There are also projections for new or more vigorously enforced crimes dealing with "white collar" offenses, such as fraud, embezzlement, and forgery. New prosecutorial offensives can be expected to deal with crimes involving computers such as electronic transfers of funds and manipulation of financial markets. More and more offenses will involve international transactions, given the increasing globalization of the economy. Furthermore, we can expect that prisoner rights litigation over conditions of confinement will increase as prison populations exceed everyone's expectations. The burden on state budgets felt from the current prison expansion program, which shows no sign of slowing, will result in state funding crises for other important state functions, such as education, and we can

26. See HUDSON INSTITUTE, *supra* note 15, at 5-10; Delphi Study, *supra* note 12, at 299-302 (listing examples of such factors).

27. See Chief Justice William H. Rehnquist, Remarks at a United States Sentencing Commission Symposium on "Drugs and Violence in America" (June 18, 1993), in REUTER TRANSCRIPT REP., June 18, 1993, available in LEXIS, News Library, Script File (discussing the severe demands the war on drugs has placed on some federal courts); see also Vincent L. McKusick, *Combining Resources*, NAT'L L.J., Nov. 19, 1990, at 13 (arguing that federal and state courts should pool their resources to deal with the spiraling number of drug cases).

28. Delphi Study, *supra* note 12, at 299.

expect more public law litigation contesting legislative compromises over taxing and spending. The crisis of funding for the courts certainly will worsen.²⁹

Identifiable political, social, and economic factors likewise will affect the civil caseload in four primary categories.³⁰ First, there is every reason to expect that political decisions will continue to extend civil rights and antidiscrimination statutes to more and more groups as well as individuals. Legislative understandings of what types of discrimination should be made unlawful will continue to expand for the public and private sectors. This will take the form of amendments to existing legislation as well as new legislation creating new causes of action at the state and federal levels. The second major trend on the civil side will involve tort cases. Leaving aside the current debate whether the courts have experienced an explosion in tort litigation,³¹ experts see no reason to expect either significant growth or decline in current levels of litigation for the familiar categories of personal injury cases. Currently developing areas of tort litigation, involving, for example, health and environmental matters, will be stimulated. These new causes of action will deal with complex and difficult issues of causation and risk allocation, often against a background of elaborate administrative regulations. Specific environmental and scientific issues—such as acid rain, ozone depletion, and global warming—will be litigated at international and global levels of involvement.³² These will press the limits of judicial adaptability, as science and technology develop beyond existing legal concepts and procedures.³³ Third, forecasts predict more cases dealing with engineering, technology, and

29. See Fuller & Boersema, *supra* note 16, at 227 (burgeoning entitlements may make it difficult to fund government services).

30. See HUDSON INSTITUTE, *supra* note 15, at 8-10; Delphi Study, *supra* note 12, at 299-302 (predicting that civil matters may be displaced by spiraling criminal caseloads).

31. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3 (1986) (examining the costs, benefits, and effects of the explosion in tort litigation and concluding that it is not a crisis); cf. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not*, 140 U. PA. L. REV. 1147, 1149 (1992) (arguing that the existing empirical evidence on the behavior of the tort litigation system is inadequate because it is clouded by many variables).

32. See Fuller & Boersema, *supra* note 16, at 229 (resulting litigation may bring about a need for special "environmental courts"); Delphi Study, *supra* note 12, at 301 (predicting a significant increase in environmental disputes).

33. See CARNEGIE COMM'N ON SCIENCE, TECHNOLOGY, AND GOV'T, *SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES* (1993) (noting the difficulty of meshing a judicial system rooted in the 19th century with 21st century technology).

science, in the contexts of copyrights, patents, and other intellectual property theories.³⁴ Fourth, current trends and predicted political decisions likely will result in growing numbers of professional malpractice lawsuits in traditional areas such as medicine and law as the professions become "de-mythologized." This attitude and these suits likely will spread to more novel areas such as education, religion, and even government. Fourth, alternative dispute resolution mechanisms will be structured to offset partly these expectations for more and more court cases. However, their increased use will further complicate court administration and funding decisions.

Given the differences between state and federal courts, in composition, organization, and jurisdiction, these predictions will have different impacts on the two judiciaries. Furthermore, there are numerous other factors that affect the judicial system which, futurists admit, are virtually impossible to assess.³⁵ These other factors easily can overcome the individual predictions I have summarized, and conceivably even their cumulative effect. The level of litigiousness in society is well-nigh impossible to measure, let alone predict. It seems to be influenced by such complex forces as the attitudes of lawyers and clients, the receptivity of judges and courts, and the agendas of legislatures. A sociologist has more chance of explaining this aspect of our culture than does a legal scholar or courts expert. Forecasts of the effect on court caseloads from these factors thus are fraught with difficulty, if not impossibility, and predictions must be so tentative and so qualified that they amount to educated guesses about the near future.³⁶ While

34. Pamela Coyle, *Techno Trials*, A.B.A. J., Oct. 1994, at 66.

35. See HUDSON INSTITUTE, *supra* note 15, at 11-13; Delphi Study, *supra* note 12, at 302-03 (pointing out the difficulty of determining the impact of emerging societal trends).

36.

To forecast growth in the federal caseload, then, one must be able to predict changes in the nation's substantive goals—a hazardous enterprise. It is difficult to predict any but the grossest social, economic, political, or demographic trends more than a few years in advance. It is even harder to predict what kinds of law are likely to emerge and how these laws will affect the federal courts. Such difficulties frustrate long term planning for the federal judiciary, making it irresponsible to offer solutions purporting to look more than a few years ahead.

FEDERAL COURTS STUDY COMM., REPORT OF THE SUBCOMMITTEE ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES (Mar. 12, 1990), *reprinted in* 1 FEDERAL COURTS STUDY COMMITTEE WORKING PAPERS AND SUBCOMMITTEE REPORTS 1, 136 (July 1, 1990).

these intangible factors will determine the future, they are inherently impossible to predict. The most we can hope to do is to discuss them rationally and consider the possibilities. We can be sure of one thing: the next generation of court reformers will have their hands full solving the problems created by our generation.³⁷

My organization will be to sketch briefly some likely future scenarios for state courts and federal courts and then highlight what I expect will be the future opportunities for cooperation and judicial federalism.

II. THE FUTURE OF THE STATE COURTS

Of the two judicial branches, state and federal, the state courts are the more stable branch today and collectively are doing more to prepare for the future. This assumption may be faulty, the product of my limited familiarity with state courts and my greater awareness of federal courts. I do not think so, however. I can confidently predict that the future of the state courts will be "more or less" the same as the present. Better stated, I predict "more" and "less" in the state courts' future: "more" cases and "less" in terms of resources.³⁸

A. More Cases

"[T]he state courts are and will continue to be the primary arena for the resolution of legal disputes in the United States."³⁹ By comparison to the federal judiciary, the fifty state court systems are Brobdingnagian and nearly defy statistical measure.⁴⁰ State court statistics are compiled each year by joint project of the Conference of State Court Administrators, the State Justice Institute, and the National Center for State Courts. The most recent annual

37. "The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms." Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 624 (1985).

38. "We do not know enough about the future to be absolutely pessimistic." Martin E. Marty, *The Many Faces of Technology, The Many Voices of Tradition*, in *TRADITIONAL MORAL VALUES IN THE AGE OF TECHNOLOGY* 131 (W. Lawson Taitte ed., 1987).

39. CONFERENCE OF STATE COURT ADM'RS, *STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992*, at xi (1994) [hereinafter *ANNUAL REPORT 1992*] (reporting on a joint project of the Conference of State Court Administrators, the State Justice Institute, and the National Center for State Courts' Statistics Project).

40. "Any attempt to assess the business of the nation's state courts must appreciate the enormity and complexity of bringing together information from 50 distinct and highly diverse court systems." *Id.*

report identified three trends that are likely to continue for the foreseeable future:

— Annual increases in caseload volume continue in an upward trend. An extrapolation suggests that trial and appellate caseloads will double before the end of the decade.

— Trial and appellate filings exceed dispositions and backlogs are rising. The public demand for court services will continue to outstrip supply.

— Over the past five years criminal cases have represented the greatest caseload increases. Proportionally more and more judicial resources and support services are being reallocated to those cases.⁴¹

Due to their size, in the aggregate, the state courts are far more important for our nation's judicial future than are the federal courts. The state courts dominate the federal courts statistically. An estimated 95% to 99% of all litigation at the trial level in the United States occurs in state courts.⁴² While the state trial courts of general jurisdiction have 15 times as many judges as the U.S. district courts, state trial judges handle 83 times as many criminal cases and 41 times as many civil cases as their federal colleagues.⁴³

Recent trend lines are relevant to compare. Taking 1985 as a base year, civil filings in state courts have grown 21%, while civil cases in U.S. district courts actually have declined 16%.⁴⁴ During the same period, criminal filings increased 22% in federal courts, but the increase in the state courts has been 39%, almost twice as much.⁴⁵ Much has been made of the docket threat of drug cases in the federal courts; however, state courts in many individual states handle more drug cases in a year than the entire federal system.⁴⁶ The bottom line statistical comparison is this: on aver-

41. *Id.*

42. FRANK M. COFFIN, ON APPEAL—COURTS, LAWYERING, AND JUDGING 56 (1994); McKusick, *supra* note 27, at 13.

43. ANNUAL REPORT 1992, *supra* note 39, at 44. If you add back in state court filings in traffic and ordinance cases, "the state courts, in the aggregate, handle more than 53 times as many cases with fewer than 20 times as many judges as the federal courts." *Id.* at 43.

44. *Id.* at 44.

45. *Id.*

46. McKusick, *supra* note 27, at 13. According to the calculations of Maine's Chief Justice, "[t]he state courts in Manhattan handle more drug cases in one day than are handled in the entire federal court system in a year." *Id.*

age, a trial judge in a state court processes more than three times as many civil and criminal cases as a U.S. district court judge.⁴⁷

Everyone can be assured of one thing: in the future there will more and more cases in state courts, and new filings will continue to exceed the state courts' capacities. When you consider the state totals, "more" means huge numbers of cases. In 1992, there were more than 93 million new cases filed in state trial courts.⁴⁸ The civil and criminal filings were more than 100 times the number of civil and criminal filings in the federal district courts.⁴⁹ Most troubling were the estimates that only about 1 out of 4 state trial courts are keeping up with new filings.⁵⁰ This is to say that 3 out of 4 state trial courts are experiencing growing backlogs.

It is also relevant to take into account the differences and similarities in the appellate caseloads of the state and federal judiciaries. A recent study of the caseloads of the state supreme courts and the U.S. courts of appeals found that:

business cases and criminal cases are roughly equal in their percentage of the total caseload, that the state courts have twice as large a share of tort cases, and that the state courts have substantial segments of real property, family law, and estate cases which are almost completely absent from federal dockets.⁵¹

Another study observed, "[a]part from criminal cases, the largest portion of state supreme court litigation involves economic issues—whether relating to state regulation of public utilities, zoning, and small businesses or labor relations and workmen's compensation, natural resources, energy, and the environment."⁵² The federal appellate courts decide nearly twice as many public law cases, although that gap has narrowed. In recent years, federal question decisions in state appellate courts have nearly tripled, accounting for more than a quarter of published state supreme court deci-

47. ANNUAL REPORT 1992, *supra* note 39, at 45.

48. *Id.* at xi (nearly 20 million civil cases, more than 13 million criminal cases, close to 2 million juvenile cases, and nearly 59 million traffic or other ordinance violation cases).

49. *Id.* at xii.

50. *Id.*

51. COFFIN, *supra* note 42, at 50, 342 n.9 (citing G. ALAN TARR & MARY C. PORTER, STATE SUPREME COURTS IN STATE AND NATION 6 (1988)).

52. *Id.* at 50, 342 n.10 (quoting DAVID M. O'BRIEN, 1 CONSTITUTIONAL LAW AND POLITICS 628 (1991)).

sions.⁵³

In this light, we should not lose sight of characteristics common to state courts that distinguish them and their problems from federal courts.⁵⁴ By comparison, "[t]he active participation of state judges in the policy process is much more taken for granted and much less controversial than the involvement of federal judges in the national government."⁵⁵ The state judiciary has broad-based jurisdiction and traditional responsibility for the common law doctrine.⁵⁶ The state judiciary usually is perceived to be more worthy and more stable than state legislatures.⁵⁷ While state judges are elected officials, they often are chosen and retained in office in nonpartisan or retention elections.⁵⁸ The political distances between state judges and state legislatures are smaller and often are bridged by prior political experience on the part of the state judges.⁵⁹ In a dozen states, state courts are authorized to render advisory opinions⁶⁰ and thus more directly and more formally participate in state policy debates. The relations among the three branches in many states must take into account the fact that the governor has a line item veto over legislation, including legislation affecting the state courts.⁶¹ Many states have traditions of direct popular law-making through mechanisms such as the initiative and referendum.⁶² Thus, while there are some aspects in common, state politics involving the state judiciaries are not merely smaller, local versions of the national experience.

53. *Id.* at 50, 342 n.11 (citing Daniel J. Meador, *Concluding Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1895, 1900 (1992)).

54. Hans A. Linde, *Observations of a State Court Judge*, in *JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY* 117 (Robert A. Katzmann ed., 1988).

55. *Id.* at 117.

56. *Id.*

57. *Id.* at 118.

58. *Id.*

59. Linde, *supra* note 54, at 118.

60. *Id.* at 118 n.1 (citing NATIONAL CTR. FOR STATE COURTS, 1984 STATE APPELLATE COURT JURISDICTION GUIDE FOR STATISTICAL REPORTING, SUMMARY TABLES 34-45 (1985)).

61. *Id.* at 118.

62. *Id.*

B. Fewer Resources

All entities of state government, including state courts, are experiencing a fiscal era characterized by diminishing resources. Available resources are effectively decreased when greater and greater demands are made on existing budgets. This is exacerbated in some states where there have been actual decreases in judicial appropriations in recent years. Demand for justice is far greater than supply. Public perceptions complicate the problem. In a recent American Bar Association poll, respondents estimated that, on average, 27% of their federal, state, and local government expenditures went for criminal and civil justice activities. The respondents even supported higher funding, up to 34% of all government expenditures.⁶³ What is the actual number? Just more than 3%.⁶⁴ Of course, people who believe that courts receive more than a quarter of their tax dollars and who would be willing to spend more than a third of their tax dollars to support courts, are entitled to high expectations from their courts systems. Over half (58%) of the respondents believed that whatever the expenditure level was for courts, it was too low and expressed a willingness to pay more taxes for better court funding.⁶⁵

We can compare those public perceptions with budget realities. Governments in the United States, federal, state, and local, spent \$74 billion of their funds on the nation's justice system in 1990, the most recent year for which totals are available.⁶⁶ That is a lot of money, but it represents only 3.3% of total governmental expenditures.⁶⁷ And it compares to 20.5% on social insurance programs, 14% on education, 10.7% on interest on debt, and 3.5% on transportation.⁶⁸ This \$74 billion total amounts to about \$299 per capita, broken down to include: \$128 for police, \$100 for corrections, \$29 for prosecution and public defense, and \$37 for courts.⁶⁹ Government spent \$37 per capita for courts. This compares with \$49 per capita for space research and technology.

We should examine what the present reality is like at current funding levels before speculating about the future. U.S. Circuit

63. Steven Keeva, *Demanding More Justice*, A.B.A. J., Aug. 1994, at 46, 47-48.

64. *Id.* at 47.

65. The average response was \$209 in additional taxes. *Id.* at 48.

66. Don J. DeBenedictis, *Struggling Toward Recovery*, A.B.A. J., Aug. 1994, at 50, 51.

67. *Id.*

68. *Id.*

69. *Id.*

Judge Frank M. Coffin, in a commendable recent book, provides a rather Dickensian description of the sense of "almost unrelieved crisis" surrounding state courthouses:

Courts have been closed, and newly built courtrooms have remained unused for lack of judges, judicial vacancies not being filled. Plans for new facilities and equipment replacement have been canceled. Civil jury trials have been delayed, have been made conditional on the payment of a substantial fee, and have even been suspended for substantial periods. Criminal charges, even felony charges, have been dismissed for lack of capacity to hold prompt trials. Crime reduction programs, youth shelters, and public defender services have been eliminated or curtailed. Probation staffs have been cut in half. Prisons are overcrowded, forcing the early release of inmates. Public access to clerks' offices has been limited to allow shrunken staff to catch up with paperwork. Court employees have suffered massive reductions and deferments in compensation, curtailment in travel and court security, and elimination of training programs.⁷⁰

A "second opinion," if one is needed, can be found in the report of the American Bar Association's Special Committee on Funding the Justice System. Based on a survey of all the state justice systems, the Special Committee concluded, "[t]he justice system in many parts of the United States is on the verge of collapse due to inadequate funding and unbalanced funding."⁷¹ That report sounded the alarm that "the American justice system is under siege and its very existence is threatened as never before."⁷²

How did we get to this point? State judiciaries are vulnerable in state politics. The electoral process extracts its costs.⁷³ Caseload increases and public expectations far outstrip the capacity of the state judicial system. Compensation gaps between judges' salaries and practitioners' earnings continue to widen. Balanced budget

70. COFFIN, *supra* note 42, at 62-63.

71. *Excerpts from a Report by the A.B.A. Special Committee on Funding the Justice System*, 32 JUDGES' J. 7, 8 (1993).

72. *Id.* at 9.

73. See HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 43 (1992) (noting that the cost of the electoral process can be high and that it also creates potential conflicts of interest).

restrictions on state spending translate to across-the-board reductions in funding that have pernicious effects on courts. Furthermore, there are few reasons for expecting things to change.

What are state judiciaries to do? How can we expect them to respond in the future? How should they respond? These questions can be answered in terms of the short run and the long run.

In the short run, we can expect further belt-tightening measures, marginal techniques in what has been called "cut-back management."⁷⁴ In these ways, available dollars are stretched, much like a household conserves at the end of the month to make it to payday. The problem is that the payday shows no sign of ever getting here and the projected shortfalls are far too large to be covered by such techniques. Furthermore, I submit that after years and years of cut-back management there simply are no more ways to save substantial funds, even in a unified court budget.⁷⁵ Within the larger justice system, however, there may be additional savings through radical management techniques. One example is the North Carolina program of "structured sentencing" or "capacity-based sentencing." All sentencing is done based on a grid that was developed with a computer simulation model that takes into account available prison capacity, the severity of the crime, and the defendant's past record.⁷⁶ As a result, more defendants are sentenced to probation and prisoners are given early release. While the state has had to hire more probation officers, it is less costly than prison construction.⁷⁷ This is the beginning of the fiscal realization that corrections has been the fastest growing segment of state budgets for the last several years.⁷⁸

In the long run, state courts can look to Congress. This strategy, however, is not very promising. Congress does not seem willing or able to support even the federal courts. The budgets for federal courts for the last several years have not increased suffi-

74. See Harry O. Lawson & Barbara J. Gletne, *Cutback Management in the Judicial Branch: Controlling Costs Without Courting Disaster*, 7 JUST. SYS. J. 44, 44-46 (1982) (discussing the "cut-back management" approach to managing scarce resources by developing better resource management).

75. See generally Ronald Stout, *Planning for Unified Court Budgeting*, 69 JUDICATURE 205 (1986) (discussing the points that court administrators should consider prior to implementing centralized financing unified court budgeting).

76. William Claiborne, *Making Sentences Fit the Prisons*, WASH. POST, July 16, 1994, at A1.

77. *Id.*

78. Don Phillips, *Steaming Down the Line Toward Prosperity Junction*, WASH. POST WKLY., July 24, 1994, at 32.

ciently to maintain constant levels of services. During this cycle, Congress has appropriated less than what it would cost to provide the same level of services—not higher levels to meet higher demands—as the previous year.⁷⁹ It goes without saying that Congress has not been willing to provide the federal courts with sufficient funds to pay jurors' fees and indigents' defense costs. Instead, Congress has allowed the system to shut down, requiring an extraordinary supplemental appropriation to get it going again.⁸⁰

The experience in the 1960s and 1970s with the Law Enforcement Assistance Administration (LEAA) is another historical precedent for what happens when state institutions become dependent on federal financial assistance. That program provided funds to state justice systems for all sorts of improvements. It lasted for "a 14-year period of intense activity, controversy, and constant modification, its mandate was removed and the agency expired completely in 1982."⁸¹ Courts should learn from the universities: soft money will create more new problems for state court budgets.

Even if federal funding were more permanent, the more basic question is whether the state courts want to go the route that other state government departments have gone. Today, national grants exceed one-fourth of state and local governmental budgets.⁸² More disturbing for principles of federalism than the level of dependence on national grants is how "conditions that are attached to those grants reach far into areas traditionally within the scope of state power."⁸³ Indeed, there is some question whether the states have the power to sell their sovereignty.⁸⁴ But in the arena of federal

79. *Budget Passed by House Falls Short of Judiciary's FY 95 Needs*, THIRD BRANCH, July 1994, at 1, 1.

80. See Laura Duncan, *Cash Crunch Again Hits Federal Courts*, CHI. DAILY L. BULL., June 21, 1993, at 1 (explaining that all new federal civil trials were suspended because money to pay jurors was exhausted); Eva M. Rodriguez, *Federal Courts Win \$200 Million Hike in Budget*, LEGAL TIMES, Nov. 8, 1993, at 10 (noting that funds for lawyers representing indigent clients and civil jurors were exhausted in 1993, requiring an emergency allocation).

81. Peter Haynes, *Measuring Financial Support for State Courts: Lessons from the LEAA Experience*, 11 JUST. SYS. J. 148, 149 (1986).

82. Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694, 1695 (1981).

83. *Id.*

84. William Van Alstyne, "Thirty Pieces of Silver" for the Rights of Your People: Irresistible Offers Reconsidered as a Matter of State Constitutional Law, 16 HARV. J.L. & PUB. POL'Y 303, 307 (1993) (concluding that when conditions are attached to federal spending programs that would maintain rights guaranteed by the state's constitution, the state cannot accept the federal funding).

grants-in-aid, state sovereignty does not count for much.⁸⁵ State courts should be cautious lest they be treated no better than state executives and state legislatures. The spending clause may be the only federal power more powerful than the commerce clause.⁸⁶ Consider, for example, the constitutional challenge to the conditioning of states' receipt of federal highway funds upon their enactment of a twenty-one-year-old minimum drinking age.⁸⁷ What about the Tenth Amendment or, better yet, the Twenty-first Amendment? "No problem," the Supreme Court said without much more analysis than that.⁸⁸ State courts ought to think long and hard whether the strings that might be attached to federal funds still make the money worthwhile.

One worry for the future is that Congress, on its own, might begin treating state courts like it treats the other branches of state government. This would be bad news indeed for the state courts. Since the 1970s, Congress has enacted nearly 200 federal mandates and initiatives, without any federal funding, that require colossal expenditures at the state and local levels. These unfunded mandates have become common in the environmental area, but they are proliferating in all areas of governmental activity and their projected annual costs run in the hundreds of billions dollars.⁸⁹ Congress

85. See Richard B. Cappalli, *Restoring Federalism Values in the Federal Grant System*, 19 URBAN LAW. 493, 502-03 (1987) (arguing that Congress has indeterminate power over the states through grants-in-aid resulting from a combination of the spending power, the necessary and proper clause, and the supremacy clause).

86. Margaret G. Stewart, *Political Federalism and Congressional Truth-Telling*, 42 CATH. U. L. REV. 511, 522 (1993) (arguing that use of the spending power to regulate in lieu of direct regulation through the commerce clause makes it more difficult for the political process to defend the role of the states).

87. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

88. *Id.* at 212 (upholding statute conditioning a state's receipt of some federal highway funds on implementation of 21-year-old minimum drinking age).

89. See William Claiborne, *Unfunded Mandates Occupy Center Stage*, WASH. POST, May 18, 1994, at A21 (estimating that state and local governments will spend over \$200 billion to comply with federal waste water mandates alone during the 1990s); G. Tracy Mehan, III, "The Buck's Passed Here": *Unfunded Mandates for State and Local Governments*, HERITAGE FOUND. REP., Sept. 22, 1993, available in LEXIS, Nexis Library (calculating that compliance costs with environmental mandates would total \$1,084,484,880 in 1991); Ron Scherer, *Mayors Balk at Washington Telling Them How to Spend Their Money*, CHRISTIAN SCI. MONITOR, Jan. 7, 1994, at 2 (noting that mayors are upset over new spending forced upon them by the federal government and citing a study which found that cities were spending 11.7% of their budgets to meet required federal programs); Pete Wilson, *How Federal Mandates Are Bankrupting the States*, WASH. TIMES, Mar. 18, 1994, at A25 (pointing out that federal immigration statutes compel states to spend approximately \$400 million in health insurance costs alone for illegal aliens).

shows little sign of giving up this control over state and local budgets.⁹⁰ State judges can ask their federal court colleagues to help them imagine a worst case scenario. Suppose, for example, the Congress decided to do to state courts what it did to federal courts in the Civil Justice Reform Act of 1990.⁹¹ Clearly, the lesson is that depending on the kindness of Congress is a risky future.

The federal executive is neither a likely nor a better friend of the state courts. One might logically expect federal recognition of the role state courts play in effectuating federal policy to result in financial impact funding. "Inasmuch as such a significant portion of state judicial manpower is devoted to federal purposes," Professor Meador once argued, "it is not inappropriate that federal funding assist those judicial systems in developing more effective procedures and in bringing into services the most advanced technology."⁹² Congress created the State Justice Institute in 1984 to institutionalize just such a policy "on a permanent basis."⁹³ Just as permanent has been executive branch opposition. In a remarkable measure of bipartisanship, the Reagan administration, then the Bush administration, and now the Clinton administration, all have targeted the State Justice Institute (SJI). To borrow a phrase, this President and his two predecessors have not been "friends of the courts." Presidents appear to be capable of being penny wise and pound foolish; the latest effort to eliminate SJI would have saved

90. Bills have been introduced to allow for a point of order during floor debate against legislation creating unfunded mandates. See, e.g., S. 993, 103d Cong., 2d Sess. (1994); H.R. 4771, 103d Cong., 2d Sess. (1994).

In the early days of the 104th Congress, legislation to end the practice of imposing federal mandates on the states has been linked with the debate over the balanced budget amendment. The Job Creation and Wage Enhancement Act of 1995, H.R. 9, 104th Cong., 1st Sess. (1994); see Jerry Gray, *The 104th Congress: The Overview*, N.Y. TIMES, Jan. 18, 1995, at A1 (noting how the Senate debate on the unfunded mandates bill has raised concerns about the balanced budget amendment being logically inconsistent with a ban on unfunded mandates).

91. See 29 U.S.C. §§ 471-482 (1990) (requiring each district court to implement a civil justice expense and delay reduction plan); Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 382 (1992) (concluding that the Civil Justice Reform Act violates the separation of powers principle and interferes with the ability of federal courts to control the internal proceedings of civil litigation); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1284, 1288 (1993) (noting that the Civil Justice Reform Act shifts judicial rulemaking authority from federal courts to Congress).

92. Daniel J. Meador, *Federal Law in State Supreme Courts*, 2 CONST. COMMENTARY 347, 355 (1986).

93. *Id.*

less than a person wins in a state lottery.⁹⁴ It has taken the intervention of such congressional friends of the courts as Neal Smith and Howell Heflin to save SJI from the executive budget axe.⁹⁵

In the theoretical future, state courts might try to emulate state executives and sue the federal government under a theory of federal impact fund relief. Congress has the power under the Constitution to give federal courts exclusive jurisdiction of matters within the Article III federal judicial power but, unless Congress does so, state courts have concurrent power to hear and decide cases based on federal law.⁹⁶ State courts that otherwise have jurisdiction may not generally decline to enforce federal laws.⁹⁷ In the words of the Supreme Court:

Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.⁹⁸

One question still is open in this regard: “The Supreme Court has not yet considered whether Congress can require state courts to entertain federal claims when there is no analogous state-created right enforceable in the state courts.”⁹⁹ But it is a professor’s point to suggest that state judiciaries could escape the burden of federal issues by closing down state trial courts to analogous state law claims.

It is not so unrealistic to predict that state judicial branches could adopt the “sue-the-federal-bastards” approach taken recently

94. See David Lawsky, *Clinton to Shut Down 115 Programs*, REUTERS WORLD SERV., Feb. 4, 1994, available in LEXIS, Nexis Library, Wires File (shutting down SJI would save only approximately \$6 million dollars); see also Ray Archer, *Little-Known Federal Programs Hold the Key to Safeguarding Treasury*, ARIZ. REPUBLIC, Mar. 15, 1993, at A10 (reporting the SJI Chairman’s request for additional funding); Neil Brown, *A Federal Program that Refuses to Die*, SACRAMENTO BEE, Mar. 15, 1993, at B13 (reporting President Clinton’s recommendation to eliminate the SJI).

95. Congress recognized the viability of the SJI in the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 40607-40608, 108 Stat. 1796, 1982 (1994), by assigning it specific tasks for research and coordination.

96. 1A-PT2 JAMES W. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 0.201 (2d ed. 1994).

97. *Id.*

98. *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

99. CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 290 (5th ed. 1994).

by state executives in public controversies over the impact on state budgets from illegal immigration. The states of Arizona, California, and Texas have sued the U.S. Government for its failure to control national borders, a failure the suits allege has obliged the plaintiff states to bear the costs of public education, health care, social services, and law enforcement totaling in the billions of dollars.¹⁰⁰ We could see the same legal theory applied to the concurrent jurisdictions that Congress routinely enacts that have a profound impact on state judicial budgets. This is not so farfetched a legal theory. There have been federal statutes on the books for a long time that authorize reimbursement payments for the impact on state and local governments from federal installations such as military bases.¹⁰¹

Facing up to reality, even future reality, obliges us to admit that the most likely source of relief for state court budget woes is the state legislature. Later, I will discuss some ideas for lobbying state legislatures. For now I want to repeat the prediction that state budgetary woes will continue and worsen. That brings me to another related prediction, extrapolated from the present: some state judicial branches already have adopted the "sue-the-legislative-bastards" approach, and I predict this trend will broaden, much to the regret of all concerned.

The problem of inadequate court funding can lead to a separation of powers showdown that ends up in court. This showdown happened in New York in 1991.¹⁰² The Governor submitted a budget that substantially reduced the funding requested by the state judicial branch. Chief Judge Wachtler of the New York Court of

100. See, e.g., Sylvia Moreno, *Texas Sues U.S. Over Immigration*, DALLAS MORNING NEWS, Aug. 4, 1994, at 16A; Rorie Sherman, *Immigration Suits Gain Critical Mass*, NAT'L L.J., June 13, 1994, at A6 (arguing that California's suit against the federal government to recover the costs of imprisoning, feeding, educating, and housing illegal immigrants actually springs from politics and not sound legal reasoning); Sam Howe Verhovek, *Texas Plans to Sue U.S. Over Illegal Aliens Costs*, N.Y. TIMES, May 27, 1994, at A10 (announcing Texas' and Florida's suits against the federal government to recover the costs of public services for illegal immigrants).

101. See, e.g., 10 U.S.C. § 2391 (Supp. 1994) (authorizing the allocation of funds to state and local governments to offset the adverse impact of closing military installations); 12 U.S.C. § 1715Z-3 (1988) (providing mortgage insurance for areas impacted by the military).

102. See Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Powers*, 78 JUDICATURE 12 (1994) (arguing that Wachtler pushed the doctrine of inherent powers beyond its limits); John K. Powers, *Crisis in the Courts?—The New York Experience*, TRIAL, Apr. 1993, at 22 (discussing Wachtler and whether the judicial branch has the inherent power to compel the legislature and executive branches to provide funding for the courts).

Appeals sued the Governor in state court to compel adequate funding. Governor Cuomo then brought suit in federal court to enjoin the court proceeding. When federal relief was denied, the Governor removed the state court suit to federal court and filed a separate action for a declaratory judgment. The spectacle garnered a great deal of media coverage but never went to trial. The litigation was settled to the satisfaction of the judicial branch.¹⁰³

The doctrine of inherent powers posits that "the very existence of the courts implies their authority to exercise power reasonably necessary to the performance of judicial functions."¹⁰⁴ The New York case was not the first to invoke the theory. Sadly, it has a venerable common law history in the several states, though typically the doctrine has been invoked in smaller disputes over smaller budget matters.¹⁰⁵ There may be a state constitutional basis for this theory: "Unlike state agencies, courts cannot reduce services; they are constitutionally mandated to administer the judicial power of the state."¹⁰⁶ In 1991, the Florida Supreme Court invalidated a budget-balancing statute that defined the courts as a "state agency" subject to an executive commission's authority to reduce funding, by invoking the separation of powers in the state constitution.¹⁰⁷

The typical defense is either that the courts are still functioning or that the "cupboard is bare."¹⁰⁸ But that bluff may be called, given the dire situation in some states.¹⁰⁹ Court leaders in several states have asked or required judges and other court personnel to

103. See *Wachtler v. Cuomo*, No. 91-CU-1235, 1991 WL 249892 (N.D.N.Y. Nov. 21, 1991); Don J. DeBenedictis, *Right to Funds*, A.B.A. J., Apr. 1992, at 17 (reporting that the settlement will allow the judicial budget to continue at \$874 million in 1992 and to be increased by \$19 million in 1993, thereby allowing closed courtrooms to be reopened and laid-off employees to be rehired).

104. Glaser, *supra* note 102, at 12; see Carl Boar, *The Continuing Development of the Inherent Powers Doctrine*, 78 JUDICATURE 22 (1994) (invoking inherent powers to secure the resources necessary for the effective operation of the courts).

105. See Ted Z. Robertson & Christa Brown, *The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY'S L.J. 863, 865 (1989) (giving, as examples, low salaries for judges and court employees and inadequate equipment).

106. *Id.* at 883.

107. *Chiles v. Children*, 589 So. 2d 260, 263-64 (Fla. 1991).

108. Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 238-45 (1993).

109. See, e.g., Don J. DeBenedictis, *Unpaid Leave for Judges*, A.B.A. J., Apr. 1992, at 17 (relating several instances where judges were forced to endure financial hardships such as being forced to take unpaid leave or to take pay cuts as a result of a state budget crisis).

take time off without pay or to forego paid leave. There have been actual court closings in some states, sometimes for a few days, sometimes for more than a week, when everyone has gone home and the courthouse door has been locked.

Because we cannot expect that the budget woes of states and state courts will improve any time soon, we can expect greater and greater temptation to resort to the confrontational lawsuit against the political branches.¹¹⁰ In my opinion, giving into this temptation would be self-defeating for the state judiciaries. At best, these suits are pyrrhic victories.¹¹¹ I am not persuaded that this is an effective political tool to gain leverage in the immediate budget negotiations. Furthermore, these suits may harm public confidence and support for the courts and likely will undermine relations with the political branches in the long run.

There is an alternative to the state judiciary bringing the lawsuit. Beyond the institutional interest of the judicial branch, there are also individual rights at stake as, for example, under state constitutional guarantees to open courts.¹¹² After the Supreme Court ruled that the Fourteenth Amendment did not require it,¹¹³

110. See *Is U.S. Justice System in a Crisis?*, NAT'L L.J., Aug. 2, 1993, at 23-24 (reporting that judges and attorneys interviewed thought that a lack of funding is the greatest problem confronting the justice system).

111. See Glaser, *supra* note 102, at 22 (noting that the handling of the *Wachtler v. Cuomo* case has undermined public confidence in the judiciary and injured the judiciary's relationships with the other branches to the extent that the damage resulting from the case has outweighed the potential gains in funding).

112. See Jeffrey A. Parness, *Comparative American Judicial Systems*, 24 U. RICH. L. REV. 171, 180 (1990) (suggesting that this type of suit could be based on the infringement of individual state constitutional rights). At least in theory, there could be some federal constitutional basis for such a lawsuit. See Charles Clark, *The Role of National Courts in 200 Years of Evolving Governance*, 18 CUMB. L. REV. 95, 107-08 (1987) (cautioning that such relief is only warranted when expressly authorized by Congress pursuant to its power to enforce the Fourteenth Amendment). But profound federalism problems abound. See, e.g., *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (dissolving a district court's desegregation decree after recognizing that the allocation of power under our federal system would make a continued displacement of local authority unconstitutional); *Missouri v. Jenkins*, 495 U.S. 33, 57 (1990) (holding that the federal government can require a school district to levy taxes exceeding statutory limits "in order to compel the discharge of an obligation imposed . . . by the Fourteenth Amendment"); *Spallone v. United States*, 493 U.S. 265, 280 (1990) (holding that a district court's contempt sanctions imposed on City Council members for violating Title VIII and the Equal Protection Clause by intentionally enhancing segregation in housing were an abuse of discretion); see generally Joel H. Swift, *Fiscal Federalism: Who Controls the States' Purse Strings?*, 63 TEMP. L. REV. 251 (1990) (examining the Supreme Court's treatment of state fiscal autonomy and the Court's attempt to distinguish between judicial and legislative invasions of the states' reserved powers).

113. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1 (1973) (holding that the

the Texas Supreme Court interpreted the right to education provision in the Texas Constitution to oblige the Texas Legislature to increase and equalize funding for public schools.¹¹⁴ Why not apply that same reasoning to state constitutional provisions dealing with state courts?¹¹⁵ Public interest groups and state bar associations might have organizational standing to bring these suits on their own behalf and on behalf of their members. These plaintiffs would sue the state legislature, in effect, for breaching the state's social compact. The state courts thus would avoid the problems of a direct lawsuit against a coequal branch of state government.

The problems caused by inadequate court budgets will lead to further privatization that will manifest itself in two ways, and perhaps a third. First, private alternative dispute resolution will become a more and more attractive "alternative." Second, we can expect courts to experiment more with user fees. Third, we should not be surprised if the state courts, in future and even more dire straights, attempt to tap into the American tradition of volunteerism

Texas system of school funding, which favored wealthy school districts, did not violate the Constitution).

114. *Carrollton-Farmers Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 488, 489 (Tex. 1992). See William P. Hobby & Billy D. Walker, *Legislative Reform of the Texas Public School Finance System, 1973-1991*, 28 HARV. J. ON LEGIS. 379 (1991) (examining efforts to reform public school financing in Texas); Allan E. Parker, Jr., *Public Free Schools: A Constitutional Right to Educational Choice in Texas*, 45 SW. L.J. 825 (1991) (discussing the Texas constitutional issue of school choice and tuition reimbursement); Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771 (1990) (arguing that the original intent of the education article was not to cause inequality in school district funding). This state constitutional development has spread among the states with remarkable momentum. See Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325 (1992) (examining education equality litigation in several states); Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307 (1991) (discussing the use of education clauses in state constitutions as bases for court ordered school finance reform); Richard J. Stark, *Education Reform: Judicial Interpretation of State Constitutions' Education Finance Provisions—Adequacy vs. Equality*, 1991 ANN. SURV. AM. L. 609 (1992) (discussing the equal opportunity and adequate education approaches to education finance litigation); Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517 (1991) (discussing approaches used in pursuit of fiscal equity in schools through litigation); Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072 (1991) (arguing that legislative inertia and judicial deference to political branches have hindered plaintiffs in school financing cases from securing constitutional remedies).

115. See Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057 (1993) (exploring state enforcement of positive constitutional rights).

manifested more particularly by the legal tradition of lawyers serving pro bono publico, not as advocates but as judges.

First, by private ADR I am not talking about the tendency to recast trial judges as managers of dispute resolution who take an active role in attempting to settle cases or who divert disputes into court-annexed programs. Certainly, that trend will continue.¹¹⁶ What will change, perhaps, is the present approach that allows each individual judge to adopt a favorite alternative and then to force every dispute through it in a procrustean fashion. Indeed, one commentator has noted, "[t]he specific techniques advocated by . . . managerial judges vary so widely that it is not clear what, if anything, they have in common."¹¹⁷ There seems to be a growing appreciation among experts and practitioners of alternative dispute resolution that specific alternatives to trial are better suited to particular types of disputes.¹¹⁸ Recognizing this need for matching the alternative with the dispute will require judges in the future to perform dispute triage. They will be expected to evaluate disputes and then to assign them to the most suitable alternative. If this approach is carried to its logical extreme, courts and litigants will "stop thinking of ADR as an alternative to judicial proceedings and [will] begin to think of judicial proceedings as one of the many and varied alternatives to be matched with appropriate disputes to achieve a just and efficient resolution."¹¹⁹

By speculating that the "alternative" will be taken out of alternative dispute resolution, I am not predicting that courts will become obsolete.¹²⁰ Quite the contrary, judges will continue to be the central actors in the multi-door courthouse of the future. Privat-

116. See generally Steven Flanders, *Blind Umpires—A Response to Professor Resnik*, 35 HASTINGS L.J. 505 (1984) (arguing that managerial judging does not interfere with due process and is necessary for efficiency reasons); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (discussing the emergence of managerial judging and the absence of restraint that accompanies it).

117. E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 309 (1986).

118. See CHRISTINE B. HARRINGTON, *SHADOW JUSTICE—THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985) (examining alternative dispute resolution as a political resource).

119. THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL—THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 197 (1994).

120. See Joseph F. Weis, Jr., *Are Courts Obsolete?*, 67 NOTRE DAME L. REV. 1385, 1398 (1992) (discussing the value of non-judicial dispute resolution systems and concluding that courts are not obsolete because they serve in areas and ways that no ADR entity can).

ization might play out differently than many judges expect, however. If I understand the zeal of some trial judges for ADR, they believe that low end disputes—cases that are by some measure less deserving of a judge's time and talents—would be diverted to non-judges for resolution. It would be like the old Post Office trying to get rid of junk mail. The future might hold the opposite effect. Litigants and attorneys in high end disputes—cases in which money is no object but delay will cause problems—might take their disputes outside the courthouse into the private sector. The "rent-a-judge" phenomenon that originated in California may become more and more common in large commercial cases.¹²¹ Thus, it might end up resembling Federal Express taking premium business away from the U.S. Postal Service.

One way to keep this from happening is for the courts to develop subsidized ADR programs and summary adjudication procedures that are less expensive and more efficient for the run of cases. This would free judicial resources for "high end cases."¹²² Another way to maintain the "high end cases" would be for the public sector to compete on the same terms as the private firms. It is my prediction that filing fees will be reconceptualized in the future as user fees. Many states have experimented with increasing filing fees to generate more revenue.¹²³ Future budget problems may be the occasion for legislatures to revisit the assumption that courts are public goods.¹²⁴ The debate is predictable. The cost of running a typical trial court is estimated at between \$400 and \$600 an hour, upwards of \$5,000 a day.¹²⁵ Current filing fees are \$120¹²⁶ and so there is a free-rider problem, in common with oth-

121. See generally Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-as-You-Go Courts*, 94 HARV. L. REV. 1592 (1981) (detailing the development of "rent-a-judge" systems and evaluating the merit of such systems).

122. See Paul Nejelski, *Judicial Work in the 1980s: Nuts and Bolts*, 31 CATH. U. L. REV. 213, 218-21 (1982) (discussing future developments of nonjudicial alternatives to the current system); John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233, 2249 (1993) (discussing trends in the relationship between state and federal courts in California and suggesting ways to improve the relationship through cooperative ADR).

123. See DeBenedictis, *supra* note 66, at 50, 52-53 (discussing court systems' efforts to finance their operations).

124. See Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267, 268 (1985) (discussing free rider concerns associated with a publicly funded judicial system).

125. *Id.*

126. 28 U.S.C. § 1914 (1988).

er public goods. But more is at stake than just money. Because courts are overcrowded, each dispute is delayed and overall there is a worry for the quality of justice in a system operating beyond capacity. The economic solution would be to devise a fee schedule to shift a larger proportion of courts' costs onto litigants who will benefit and who can afford to pay, at least when there is no conceivable public benefit from the litigation. The difficult question is how to define this category for imposing appropriate user fees.¹²⁷

Both private ADR and user fees, however, compromise society's commitment to "Equal Justice Under Law." Currently, there is genuine concern that "the disparities of a multitiered justice system—with corporations, other large organizations and wealthy individuals at the top, small business and most working individuals squeezed into the middle, and the very poor entrenched at the bottom—appear to be deepening."¹²⁸ Citizens and taxpayers pay for courts of justice.

My third and least likely (though not completely facetious) prediction for the future is the idea of the volunteer lawyer-judge. Some states have already experimented with this concept to deal with backlogs and to help reduce delay.¹²⁹ Although most of the past programs have been implemented at the state trial court of limited jurisdiction, statutes currently on the books in several states authorize broader use of attorneys designated as temporary judges to preside over a given dispute.¹³⁰ These lawyer-judges usually act with the consent of the parties. This is not functionally much different from well-established programs imposing mandatory arbitration or mediation. Of course, state equivalents of the federal Article III judge requirement would have to be overcome, but that should not be considered impossible in a compelling future crisis facing the state courts.¹³¹

Any discussion of the future must take into account technology.

127. See Lee, *supra* note 124, at 272.

128. James Podgers, *Chasing the Ideal*, A.B.A. J., Aug. 1994, at 56, 57.

129. See ALEXANDER B. AIKMAN ET AL., FRIENDS OF THE COURT—LAWYERS AS SUPPLEMENTAL JUDICIAL RESOURCES at xix (1987) (discussing different jurisdictions' attempts to incorporate lawyers as judges *pro tem*).

130. NATIONAL CTR. FOR STATE COURTS, GUIDELINES FOR THE USE OF LAWYERS TO SUPPLEMENT JUDICIAL RESOURCES at v, 18 (1984).

131. But see Virginia L. Richards, Note, *Temporary Appointments to the Federal Judiciary: Article II Judges?*, 60 N.Y.U. L. REV. 702, 703 (1985) (arguing that temporary appointment of federal judges contravenes Article III's life tenure requirement and is unconstitutional).

In the context of this discussion of fewer resources, there is a certain irony to the realization that while new technology is expensive, it promises greater efficiency and cost savings. One can confidently predict that video technology will be relied on more in the future for depositions, hearings, and perhaps even trials.¹³² By now, all but a handful of states allow contemporary broadcast of in-court proceedings. This has made possible Court TV—a kind of electronic version of the courthouse hanger-on.¹³³ The states are far ahead of the federal courts in this regard.¹³⁴

While strides have been made, "[t]he current state of court automation [still] is eons behind that of the business world."¹³⁵ Automation of the clerk's office is now considered a necessity for efficient internal case management, improved productivity, and improved service to the public.¹³⁶ Computer equipment in chambers currently relied on for word processing will be more sophisticated in the future to permit comprehensive networking and elaborate data retrieval.¹³⁷

132. See B. Paul Cotter, Jr., *When the Electronic Judge Meets the Electronic Lawyer*, JUDGES' J., Spring 1988, at 2, 3 (asserting that using a computer can make judges more efficient); Robert S. Gerstein, *Appeal by Video*, L.A. LAW. Aug.-Sept. 1990, at 21, 21 (addressing the possibility of replacing trial transcripts with videotapes in the appellate process).

133. This national cable network is exclusively devoted to courtroom coverage and has more than 14 million viewers. See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 800 (1993) (stating that by the 1990s over 40 states allowed audio and video trial coverage); Stephen Brill, *Watching the Drama of Justice*, AM. LAW., Aug. 1990, at 3 (citing the trend in the states for allowing television cameras in the courtroom as leading to a 24-hour cable station); Scott Minerbrook, *It's Court Time*, U.S. NEWS & WORLD REP., July 15, 1991, at 16 (discussing the beginnings of Court TV).

134. See MOLLY TREADWAY JOHNSON & CAROL KRAFKA, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS, A REPORT OF THE FEDERAL JUDICIAL CENTER TO THE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Fed. Jud. Ctr. ed., 1994) (reporting the success of state pilot programs for electronic media coverage of trials); Stephen G. Thompson, *Electronic Media in the Courtroom: Some Observations on Federalism and State Experimentation*, 3 OHIO N.U. L. REV. 349, 353 (1982) (pointing out that Rule 53 of the *Federal Rules of Criminal Procedure* prohibits courtroom broadcasting).

135. Carol M. Neal, *Courts Enter the Computer Age, but Slowly*, NAT'L L.J., Mar. 30, 1992, at 7.

136. Cristin Birch, *Automation in the U.S. Courts*, 36 FED. B. NEWS & J. 238, 238 (1989).

137. See Brian Forst, *Overburdened Courts and Underutilized Information Technology: A Modern Prescription for a Chronic Disorder*, 68 JUDICATURE 30, 33 (1984) (noting that judicial suspicion of computer technology has eroded because of increasing case backlogs, the proliferation of powerful small computers, and the availability of more productive

Some state courts are already operating in the future by establishing computer-integrated courtrooms.¹³⁸ Judges and lawyers use computer screens to retrieve transcripts of testimony, depositions, records in earlier cases, and other data.¹³⁹ Often the systems link together prosecutors' offices, law enforcement agencies, corrections facilities, and other agencies.¹⁴⁰ Some existing systems connect the clerk's office, the judge's chambers, the prosecutor's office, and the defender's office in one integrated network.¹⁴¹ CD-ROM technology has been incorporated so that vast amounts of data can be stored, retrieved, and processed.¹⁴² Numerous courts have on-line access to opinions available to the bar and public.¹⁴³ A few technologically-advanced courts are experimenting with electronic filing and using software and a modem. These types of technology eliminate the need to file paper pleadings and allow for instantaneous access by the opponent and the court.¹⁴⁴ As far as technology is concerned, the future is here, at least in some courts.

Of course, there are limits to technology. We cannot confidently predict that judges will rely on computer programs for actual decisionmaking.¹⁴⁵ Judging is and always will remain a peculiarly human activity.¹⁴⁶ And it should be remembered that

information systems); Richard B. Klein & Patricia R. Lykos, *What Computer Support Should a Judge Have?*, JUDGES' J., Fall 1989, at 16, 18 (giving specific recommendations to judges on what computer hardware, software, and training to invest in to increase efficiency and enhance communications); Jane B. Lucal, *The Quiet Revolution: Computerization of Court Systems for the 21st Century*, 14 OHIO N.U. L. REV. 169, 177 (1987) (noting that a "vast computer revolution" is taking place in United States courts and concluding that it will continue in the future).

138. See Don J. DeBenedictis, *L.A. Log-On: Municipal Courts Automate into the Future*, A.B.A. J., July 1990, at 50, 50 (noting Los Angeles' court automation in the mid-1980s); Jessica Copen, *Courts of the Future*, A.B.A. J., June 1991, at 74, 74 (stating that the most innovative computer activity is occurring in state courts on an experimental basis).

139. Copen, *supra* note 138, at 74.

140. *Id.*

141. *Id.* at 76.

142. *Id.* at 77.

143. *Id.* at 74.

144. See Daniel B. Kennedy, *The Future of Filing*, A.B.A. J., July 1994, at 32, 32 (discussing Mead Data Central's Complex Litigation Automated Docketing System).

145. See Stuart S. Nagel, *Computer-Aided Law Decisions*, 21 AKRON L. REV. 73, 94 (1987) (stating that the costs of computer-aided decisionmaking are "mainly a willingness to think differently and more explicitly about the judicial process and lawyering than one may be accustomed to"); Charles P. Rippey, *Computer-Assisted Decision Writing*, JUDGES' J., Summer 1994, at 36, 37 (noting the fear that computer programs will lead to judges using them to replace reasoned decisionmaking).

146. See Douglas E. Winter, *Down-Time: A Fable*, LITIG., Fall 1986, at 48 (relating a fantasy story of a completely automated nonhuman judicial system which became defec-

"[t]echnology can be helpful, but it is not a panacea."¹⁴⁷ Future technology will not solve all the future problems. Indeed, it is a fair observation to note that society typically does not know what to do with new technology: "Consider some of the characteristic technologies of the last 100 years: the telephone, the automobile, the radio, the television, and the computer. At the time of their inception and for many years afterward, no one understood the implications of their invention and use."¹⁴⁸ Future technology will be utilized in the virtual future. It is more likely that in the next future the courts finally will get around to understanding and using the present technology, like personal computers. Even this is not assured, however, because what two experts said about the relatively well-off federal courts applies even more so to the budget predicament of state courts:

The ability of the courts to acquire and install computers and peripheral equipment . . . is completely dependent on the availability of a budget adequate to the task. . . . [S]erious budget reductions will not be accompanied by corresponding reductions in the workloads of the courts. . . . The public will be poorly served if the courts are forced to carry their current burdens, and accept new ones, without the aid of modern automation.¹⁴⁹

C. State Constitutional Law

Over the last decade, state constitutional law has enjoyed a renaissance which most assuredly will continue to broaden and deepen in the future. Describing how this phenomenon will manifest itself in the jurisprudences of fifty independent sovereign state supreme courts, however, is equally intimidating in the writing and in the reading. Whole books and law review symposia are given over to the subject.¹⁵⁰ A few generalizations are in order for this

tive).

147. Nejelski, *supra* note 122, at 221.

148. Tom Maddox, *The Cultural Consequences of the Information Superhighway*, WILSON Q., Summer 1994, at 29, 31.

149. Joseph W. Weis, Jr. & Gordon Bermant, *Automation in the Federal Courts: Progress, Prospects and Problem*, JUDGES' J., Fall 1987, at 14, 36.

150. See, e.g., BRADLEY D. MCGRAW, DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (1985); STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 3-79 (Mary C. Porter & G. Alan Tarr eds., 1982) (devoting three chapters to constitutional policymaking in state supreme courts); Symposium, *Emerging Issues in State Constitutional Law*, 66 TEMP. L. REV. 1145 (1993) (commenting on issues such as abortion, item vetoes, and

canvass of judicial federalism in the future.¹⁵¹

There are at least three different theories about the relationship between the state constitutions and the U.S. Constitution in deciding individual rights cases. The primacy theory¹⁵² views the state constitution as the primary source of individual rights and calls first for an analysis of the state claim. *Only* if the claim of state right is denied should the state supreme court reach and decide the federal claim. The supplemental theory¹⁵³ views state constitutional rights as supplemental to federal constitutional rights. The federal claim is resolved first and the state claim is resolved only after the federal claim is denied and the state constitution is interpreted to justify an outcome favorable to the individual and against the government. The coequal theory¹⁵⁴ views the two organic documents as being on the same decisional plane. Alternative claims under the two documents are separately considered and then independently decided. The future will bring some further reconciliation.

Whichever view of the rhetoric and hyperbole that has attended the renaissance in state constitutional law,¹⁵⁵ it must be conceded

school choice); Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1339 (1985) (addressing the growth of state constitutional jurisprudence).

151. "Let me not count the ways state constitutions are different one from the other and all from the federal." Thomas E. Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 GA. L. REV. 799, 832-33 (1985).

152. See generally Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980) (arguing that states are primarily responsible for individual rights); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984) (supporting the legitimacy of independent state constitutional adjudication).

153. See generally Robert A. Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOL. L. REV. 465 (1985) (arguing that state constitutions should be used to supplement federal constitutional rights); Herbert P. Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 889 (1980) ("The state court is bound by federal requirements and may invoke the state constitution only to provide greater safeguards.").

154. See, e.g., Phyllis Skloot Bamberger, *Methodology for Raising State Constitutional Issues*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 287, 304-05 (Practicing Law Inst. 1985) (discussing the coequal theory); Stewart G. Pollock, *Adequate and Independent Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983 (identifying a "dual reliance" approach where both state and federal law are considered).

155. Compare William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (advocating state court activism for greater constitutional protections) with Earl M. Malz, *False Prophet—Justice Brennan and the*

that this area of judicial federalism still remains today more of a future potential rather than a present actuality. The new federalism is still coming. State supreme courts today continue to rely on federal law more than state law in constitutional cases.¹⁵⁶ One can be confident, however, that the development of state constitutional law will surge dramatically in the future.¹⁵⁷ State high courts around the country, including high courts in the Mid-Atlantic states, are beginning to demonstrate an outright enthusiasm for state constitutional law.¹⁵⁸ The momentum will increase as state constitutional law precedents accumulate in the common law method.¹⁵⁹ State constitutional holdings, doctrines, and theories will begin to influence the development of federal constitutional law more than was ever thought possible.¹⁶⁰ Indeed, some scholars have concluded that the developments in state constitutional law already have become a rich source of new ideas.¹⁶¹ Even some of

Theory of State Constitutional Law, 15 HASTINGS CONST. L.Q. 429 (1988) (criticizing Justice Brennan's proposal for state court activism).

156. Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 25 (1994); see generally John W. Shaw, Comment, *Principled Interpretations of State Constitutional Law—Why Don't the "Primacy" States Practice What They Preach?*, 54 U. PITT. L. REV. 1019, 1038-50 (1993) (examining application of the primary theory by the Oregon Supreme Court and concluding that the results have been mixed).

157. See Ronald K.L. Collins et al., *State High Courts, State Constitutions, and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 622-23 (1986) (noting that state supreme court justices perceive an increase in state constitutional rights litigation, and that this trend will likely continue in the future).

158. See Gene R. Nichol, *Dialectical Federalism: A Tribute to the West Virginia Supreme Court of Appeals*, 90 W. VA. L. REV. 91, 96-107 (1987) (examining cases where the West Virginia Supreme Court has interpreted its state constitution to give broader civil rights than the analogous federal provisions).

159. Cf. Erwin Chemerinsky, *The Constitution and the Common Law*, 73 JUDICATURE 149, 150-51 (1989) (discussing recent Supreme Court trends away from federalization of the common law); John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297, 340 (1988) (proposing that federal intrusion into state decisions should decrease when the state common law is adequate).

160. See Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 28 (1993) ("The Supreme Court has been known to follow the lead of the states in expanding the scope of a federal guarantee."); Barry Latzer, *Four Half-Truths About State Constitutional Law*, 65 TEMP. L. REV. 1123, 1125-30 (1992) (arguing that states may interpret constitutional provisions more narrowly than the Supreme Court in anticipation of a later narrowing of federal constitutional law); Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 739-44 (1988) (advocating that federal courts look to state constitutional decisions for persuasive authority).

161. One scholar attributes this reliance on state constitutional law to the recent lack of

the least repentant federal judges have confessed the importance of accepting state judges into an equal partnership to enforce civil rights and civil liberties.¹⁶² As part of this larger phenomenon, we can expect one related procedural development for judicial federalism: federal courts will be obliged to certify more state law questions to the state courts in recognition of the growing renaissance in state constitutional law.¹⁶³ The "new federalism" will become even more important in the future than it is today.¹⁶⁴

D. State Court Futures Activities

The state courts are collectively far ahead of the federal courts on the learning curve about futures activities and long range planning.¹⁶⁵ This may have something to do with the fact that state

federal constitutional development, stating, "I find recent *federal* constitutionalism to be impoverished—not because it is increasingly conservative, but because it is increasingly petulant, shrill, formulaic, and intellectually incoherent." David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 277 n.18 (1992).

162.

What does this history suggest? One lesson is clear: if left alone, state courts are fully capable of vindicating the rights of most citizens against governmental oppression when the ultimate responsibility is theirs. But they tend to default when their judgements are too often reviewed and revised by federal courts. In that climate, the state courts tend to become weak—first angry, then apathetic—and inclined to pass the buck in cases involving unpopular causes. It follows, I think, that the federal courts, including the Supreme Court, must get off the backs of the state courts.

J. Skelly Wright, *In Praise of State Courts: Confessions of a Federal Judge*, 11 HASTINGS CONST. L.Q. 165, 181 (1984) (footnote omitted); cf. Carl M. McGowan, *Federalism—Old and New—and the Federal Courts*, 70 GEO. L.J. 1421, 1431 (1982) ("[F]ederalism has meant the desirability and necessity of the general government deferring to the states in order to allow them their proper role over issues of state and local concern.").

163. See generally Ronald T. Gerwatowski, *Of Comity and Common Sense: The Need for Federal Courts to Certify Questions of Unsettled State Constitutional Law*, 75 MASS. L. REV. 3, 20-24 (1990) (outlining when and how a federal court should "certify" a state law question to the proper state court).

164. See generally *Judicial Federalism: Don't Make a Federal Case Out of It . . . or Should You?*, 73 JUDICATURE 146, 146 (1989) (discussing the ramifications of the "new federalism"); Paul Marcotte, *Federalism and the Rise of State Courts*, A.B.A. J., Apr. 1, 1987, at 60, 64 (discussing the future of the power shift to state courts).

165. Indeed, state judges have a lot to teach federal judges about planning and futures activities, if federal judges are willing to learn. One judge has advocated cooperation between federal and state courts for planning:

It would, of course, be desirable to help the state systems as well as the federal system. The great bulk of disputes are resolved in state courts. However, although the [proposed] study will benefit state systems, the practicalities appear to be that, as far as planning and implementation, it would

courts have more to do, greater workload, and more diverse jurisdictions and functions than federal courts.¹⁶⁶ The shared sense of crisis is more pronounced among state judges and in state courts, where the siege mentality of workload far in excess of resources is more longstanding and far more threatening. It also may be partly the result of greater political flexibility to reorganize in the state courts. For example, while the federal courts have been weeping and gnashing their teeth over the deluge of drug cases and the draconian sentences being imposed under the federal sentencing guidelines, there has been a "drug court" in Florida's Dade County for more than five years.¹⁶⁷ The tribunal, which has been replicated elsewhere, deals with possession offenses not involving violent crime and emphasizes treatment and rehabilitation programs, education, and vocational training.

At the national level, the American Bar Association sponsored the "Just Solutions" Conference which brought together delegates from around the country to scrutinize the justice system in the United States.¹⁶⁸ The anticipated follow-up will be to establish a State Justice Commission—comprised of members of the bench and bar, court administrators, and citizens—in every state to serve as a catalyst for reform. In 1990, the American Judicature Society, with funding from the State Justice Institute, presented "The Future and the Courts Conference" to encourage state judiciaries to forecast alternative futures for the next century.¹⁶⁹ Since then, nearly half

be better to concentrate on the federal system. Developing a blueprint for the year 2000 would be immeasurably less complicated if consideration is limited to one judicial system and the three branches of the federal government. It would be extremely difficult to provide additional future planning for the 50 states. However, state courts could benefit from a close liaison with this project by representatives of the state governments. In addition, progressive states have many ideas that should be considered in the study of the federal system. To this end, I suggest that there be close cooperation with the National Center for State Courts and the Conference of State Chief Justices.

J. Clifford Wallace, *Working Paper—Future of the Judiciary*, 94 F.R.D. 225, 234-35 (1981); see Jim Dator, *Judging the Future*, 57 TEX. B. J. 758, 760 (1994) (praising the progress of some state courts' futures activity).

166. Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Maccy*, 23 J. LEGAL STUD. 647, 649 (1994).

167. *Drug Court Celebrates Fifth Year*, FLA. B. NEWS, July 15, 1994, at 13. Congress appropriated grant funds for enlarging this experiment in the Violent Crime Control and Law Enforcement Act of 1994. See *infra* notes 208-45 and accompanying text.

168. R. William Ide, III, *A Giant Step Toward Reform—Conference on Problems in Justice System Focuses on Realistic Solutions*, A.B.A. J., June 1994, at 8, 8; James Podgers & Henry J. Reske, *Facing the "New Realities"*, A.B.A. J., June 1994, at 77, 77.

169. IRA PILCHEN & SANDRA RATCLIFF, AMERICAN JUDICATURE SOC'Y, THE FUTURE

the states have already held various innovative futures activities and most of the other states are preparing similar programs.¹⁷⁰ Several of the Mid-Atlantic states already have taken definite steps to begin understanding what the future has in store and to prepare for it.¹⁷¹ A guidebook published last year by the National Center for State Courts, with a grant from the State Justice Institute, describes a successful state court "vision process" and covers such requirements as support, resources and activities, and incorporating visionary ideas into existing long-term planning efforts:

State courts have discovered the future. Throughout the U.S., state courts are employing such futures tools as environmental scanning, vision development, and anticipatory management. Courts in many states are in crisis: concerns for budget cuts, overloaded dockets, and personnel limitations. For many, futures tools are being used to improve management. Vision development has been part of some of these efforts, though not all.¹⁷²

One important feature of all this state court futures activity is the cross-pollination that is occurring as states learn from each other by borrowing and adapting successful and promising futures strategies. This interstate synergy takes such traditional forms as comprehensive reports issued by state commissions, empirical studies, scholarly papers, and so on.¹⁷³ Indeed, one challenge facing a court leader new to the futures game is how to deal with the body of information and study that presently is available.¹⁷⁴ But there is one particular forum for contemplating the futures of the state courts that is itself indicative of both the level of activity and the degree of innovation in the states. Court futures studies have gone into cyberspace. Those interested in studies on the future of the state court justice systems now regularly meet on the Internet.

AND THE COURTS: CONDUCTING STATE COURT FUTURES ACTIVITIES 1 (1993).

170. *Id.* at 29-54 (describing the futures activities projects in 22 states).

171. *Id.* at 44-46, 48-50 (describing the activities in North Carolina, South Carolina, Virginia, and West Virginia).

172. *Id.* at 53.

173. *Id.* at 29-50.

174. See, e.g., PILCHEN & RATCLIFF, *supra* note 169, at 51-54 (listing plans for new state court futures projects); COMMISSION ON THE FUTURE OF THE CALIFORNIA COURTS, JUSTICE IN THE BALANCE 2020, at 221 (1993) (listing research papers); Fuller & Boersema, *supra* note 16, at 201 n.2 (identifying futures studies of several major state judiciaries).

There is a discussion list monitored by James Dator, a professor at the University of Hawaii and Director of the Hawaii Research Center for Future Studies, and Judge Richard Klein, a Philadelphia trial judge and vice-chair of the steering committee of the Pennsylvania Future Commission on Justice in the 21st Century. It is located at Temple University along with a Court Futures Studies Gopher that serves as a repository of information.¹⁷⁵

When it comes to futures activities, the state courts have proven themselves to be laboratories of imagination in the best sense of that Holmes-Brandeis federalism metaphor: state courts have acted responsibly to prepare for what is ahead and have demonstrated an admirable willingness to be bold and adventuresome.¹⁷⁶

III. THE FUTURE OF THE FEDERAL COURTS

The situation in the federal courts today is relatively unstable. By comparison to the state courts, the future of the federal courts is far less certain and less predictable. Perhaps because of this, federal courts appear to be substantially less future-oriented than the state courts. The big reason for the first conclusion of instability and uncertainty is that Congress simply does not know what it is doing so far as the issue of "federalization" is concerned. There are additional reasons having to do with jurisdiction, procedure, and structure. The second conclusion, about the lack of focus on the future, may be based on an unfair comparison between, on the one hand, the fifty independent and separate state judiciaries which guarantee variety and, on the other hand, the monolithic federal judiciary which is characterized by one legislature, one supreme court, and one administrative organization. The federal judiciary is further complicated by the tradition of decentralization and autonomy which, notwithstanding John Donne, encourages each federal judge to be an island.¹⁷⁷

175. To subscribe by modem, send mail to LISTSERV@TEMPLEVM.BITNET or LISTSERV@VM.TEMPLE.EDU. In the body of the message, write "SUBFUTUREL." If you encounter problems, contact Judge Klein at V5444E@TEMPLEVM.BITNET or V5441E@VM.TEMPLE.EDU; his "snail" mail address is 215 One E. Penn Square, Philadelphia, PA 19107.

176. The metaphor, often used by Justices Brandeis and Holmes, has become part of the vocabulary of judicial federalism. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing states as laboratories for social and economic experiments); *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (describing the Court's hesitation to quash social experimentation by states).

177. For example, when various amendments to the *Federal Rules of Civil Procedure*

A. Federalization

The big story now and in the future for the federal courts is "federalization." In a new monograph published by the Federal Judicial Center that is the single best treatment of the arguments, Judge Schwarzer and his coauthor define the problem as "the extension of federal court jurisdiction to civil claims and criminal prosecutions that could be maintained in state courts."¹⁷⁸ The issue is complicated and multiphasic:¹⁷⁹

It is beyond argument that, for a variety of reasons, Congress has increasingly looked to the federal courts as the place to attack problems it regards as having national significance. Congress has created new rights of action and remedies, many of which touch areas traditionally covered by state law; and it has enacted criminal statutes opening the federal courts to the prosecution of offenses that traditionally would have been brought in state courts. Similarly, the executive branch has increasingly prosecuted in federal court offenses that could have been prosecuted in state court. The bar, for its part, jealously protects its access to

went into effect on December 1, 1993, each district court was accorded authority to abrogate or modify the amendments in several particulars. By a vote of the district judges, the Northern District of Texas decided not to exercise this authority uniformly within the district. Rather, the district court entered an order that provided in part: "Each judge will apply the amended Federal Rules in the manner the judge deems appropriate and will provide the parties with appropriate notice regarding how the judge intends to apply the amended rules." *Applicability of the New Federal Rules of Civil Procedure in the Northern District of Texas*, LUBBOCK LAW NOTES, Jan. 1994, at 1, 6 (quoting Northern District of Texas' Special Order No. 2-12 on Dec. 21, 1993). This had the effect of rendering the uniform, national rules of procedure into judge-specific regulations. See DONNA STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN FEDERAL DISTRICT COURTS, WITH SPECIFIC ATTENTION TO SELECTED COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (Fed. Jud. Ctr. ed., 1994) (describing lack of compliance with amended Rule 26 by federal courts).

178. WILLIAM W. SCHWARZER & RUSSELL R. WHEELER, ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 1 (Fed. Jud. Ctr. ed., 1994).
179.

The case for deregulation and devolution to state and local authorities often depends on the purpose of a regulatory scheme. Some regulatory schemes are designed to promote economic goals; some are redistributive; others are designed to protect rights. Some regulatory programs are also intended to shape preferences, to reflect the outcome of deliberative process among the citizenry or representatives, or to promote noncommodity or public values.

Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 507 (1987).

the federal courts. And state officials are watching with mixed emotions, concerned about the impact of these trends on the stature and independence of state courts but also conscious of the resulting relief afforded state court dockets.¹⁸⁰

The debate over federalization is part of a larger debate over the proper or ideal role of the federal courts under the Constitution. The 1969 study of judicial federalism by the prestigious American Law Institute attempted a comprehensive approach based on "rational principle."¹⁸¹ In its 1990 *Final Report*, the Federal Courts Study Committee attempted "a principled allocation of jurisdiction."¹⁸² Over the years, numerous academic critics have attempted to articulate some "grand unified theory" against which to measure existing and proposed federal jurisdiction.¹⁸³ One attempt at a comprehensive approach would analyze federal court jurisdiction against the following criteria: (1) facilitating state-federal cross-pollination; (2) maintaining the autonomy of the two judicial sovereigns; (3) preserving some degree of litigants' choice; (4)

180. SCHWARZER & WHEELER, *supra* note 178, at 3.

181. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURT 6 (1969).

182. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 35 (1990).

183.

We began this article with the intent of constructing an ideal model of federal jurisdiction for Congress to use in allocating judicial resources. After further consideration we concluded that this is not a fruitful approach and, indeed, that the common assumption that there is an objectively "correct" model of federal jurisdiction misconceives the problem. There are objectively identifiable outer constitutional limits on federal jurisdiction—the limits established in Article III of the United States Constitution. But these are extremely permissive, and no one contends that federal jurisdiction should extend that far. Within the limits of Article III, however, the Constitution establishes no objectively "correct" role for the lower federal courts. On the contrary, largely because they could not agree on what role the federal courts should play, the framers of the Constitution left such questions to Congress, essentially making the lower federal courts a resource to be used as Congress deems necessary.

The decisions Congress makes in this regard reflect important value choices and have significant political consequences. . . . History thus underscores that any model identifying the "proper" role of federal courts has inescapable and far-reaching substantive implications, and, as a result, an unavoidable political dimension. Defining the role of the federal courts is not a scientific inquiry.

Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 75-76.

achieving litigation efficiency; (5) assuring fundamental fairness; (6) restraining the judicial branch within the judicial role; and (7) expecting an overall coherence and logical consistency of jurisdictional principles.¹⁸⁴

However, these are all more descriptive than prescriptive. None of them has the force of *must*. Rather, they are all merely *oughts* of gentle persuasion. Issues of federal court versus state court jurisdiction are best understood to be issues of power. The demarcation of federal court jurisdiction is given over to the Congress.¹⁸⁵ Federal jurisdiction is not law.¹⁸⁶ It is politics. General lessons for the future can be gleaned from the history, tradition, and precedents of federal jurisdiction.¹⁸⁷

Henry J. Friendly, learned judge and federal courts scholar, described the reality of federal court jurisdiction as existing between two extreme philosophies.¹⁸⁸ The minimalist philosophy posits that "the best course is to put trust in the state courts, subject to appropriate federal appellate review, save for those heads of jurisdiction, by no means insignificant in case-generating power, where everything is to be gained and nothing is to be lost by granting original jurisdiction to inferior federal courts."¹⁸⁹ At the other extreme, the maximalist philosophy "would go to the full sweep of constitutional power" under Article III because "the federal courts provide a 'juster justice' than the state courts, [and] the more cases there [are] in the federal courts, the better."¹⁹⁰

There are valid reasons, now and in the future, for preferring

184. Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1772-85 (1992).

185. See A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Fundamental Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 790-91 (1985) (analyzing the state sovereignty and separation of powers limits on the power of the Supreme Court); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993) (discussing the need for a principled law of federalism); Louise Weinberg, *The New Judicial Federalism: Where We Are Now*, 19 GA. L. REV. 1075, 1076 (1985) (discussing recent cases which have shifted power from state courts to federal courts).

186. See Gene R. Nichol, *Is There A Law of Federal Courts?*, 96 W. VA. L. REV. 147, 152 (1993) (discussing the importance, ramifications, and manipulation of federal jurisdictional rules).

187. See RICHARD A. POSNER, *THE FEDERAL COURTS—CRISIS AND REFORM* 169-97 (1985) (discussing the theory of federalism and its current problems).

188. HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 8-12 (1973).

189. *Id.* at 8.

190. *Id.* at 12.

state government as the locus for public policy. But without a doubt, the maximalist philosophy has been ascendent in Congress for the last few decades and one can confidently predict it will continue to be so in the future. By the count of the Administrative Office of U.S. Courts, over the last twenty years Congress has enacted over 200 new laws—202 to be exact—that have multiplied the workload of the federal courts.¹⁹¹ There is no end in political sight. Federalization is characterized by a multiplier effect. Today there are few areas of primary state concern.¹⁹² Tomorrow there will be fewer still.¹⁹³

Consider the following examples of federalizations that presently are on the horizon: NAFTA/GATT, the Crime Act of 1994, health care, products liability, and statutory overrulings of the Supreme Court.

1. NAFTA/GATT

The increasing globalization of the economy is manifested by two treaties, one just ratified, one currently being renegotiated. Their transnational consequences for domestic state and federal law are noteworthy.¹⁹⁴

After President Clinton signed the North American Free Trade Agreement (NAFTA) in December 1992, Congress debated at great length the treaty's "implications for the economy, unemployment, and the environment" before eventually enacting wide-ranging legislation to implement the treaty.¹⁹⁵ NAFTA has created a conti-

191. *Legislation Enacted During the Last Two Decades Tending to Increase Judiciary's Workload*, CT. ADMIN. BULL., Sept. 1994, at 16, 16-18. This increase in the number of laws can be added to the concomitant growth in the size and influence of the federal government in preexisting areas of federal law and the docket. Steven Flanders, *What Do Federal Courts Do? A Research Note*, 5 REV. LITIG. 199 (1986).

192. See, e.g., John C. Coffee, Jr., *The Future of Corporate Federalism: State Competition and the New Trend Toward De Facto Federal Minimum Standards*, 8 CARDOZO L. REV. 759, 759 (1987) ("[T]oday we are witnessing the promulgation of new types of federal minimum standards that significantly regulate public corporations and constrain state law"); Mary E. Kostel, *A Public Choice Perspective on the Debate Over Federal Versus State Corporate Law*, 79 VA. L. REV. 2129, 2149-54 (1993) (discussing difficulties with federal regulation of corporate law).

193. "[F]ederal efforts in some areas have been successful, such as in the policing of racial discrimination, regulating air, water, and other environmental pollution, but have enjoyed little success in matters of health, education, welfare, housing, child support, and drug abuse." Patrick E. Higginbotham, *Federalism in the Future*, in *FEDERALISM: THE SHIFTING BALANCE* 55, 61 (Janice C. Griffith ed., 1989).

194. "As our shrinking planet approaches the millennium, one should expect some effort to put important legal issues in comparative perspective." Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 23 (1993).

195. Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free*

mental free trade area "covering over 369 million people and \$5,351 billion of gross domestic product," the largest in the world.¹⁹⁶ Congress is still considering the Uruguay Round of Multilateral Trade Negotiations, more commonly referred to as the General Agreement on Tariffs and Trade (GATT), which has taken eight years to negotiate, was signed by over 100 nations, and is about 22,000 pages long.¹⁹⁷ It will reduce or eliminate more tariffs and trade barriers than any other compact in world history. GATT is bigger than NAFTA: it includes more than 100 countries, covers more products and involves more money. The proposed new agreement would affect exports and imports in everything imaginable in every state.

NAFTA has the potential for creating regulatory gaps in domestic law. Subjects that before the treaty were regulated by federal or state statutes may be effectively deregulated.¹⁹⁸ The treaty is remarkable in the degree of its specificity.¹⁹⁹ On its face, the treaty provides that governments will continue to wield the sovereign regulatory powers over the health and safety of workers, the welfare of consumers, and the general environment. But it is understood that NAFTA will have the de jure effect of preempting state and national laws that have a significant effect on trade.²⁰⁰ Furthermore, economic pressures on state governments may well create a de facto preemption of such measures currently on the books. States legislatures may deregulate to attract and encourage new industry and investment and to prevent existing businesses from relocating.²⁰¹

One of the de jure displacements in NAFTA has to do with federal court jurisdiction. Under the treaty, a binational dispute resolution system is substituted for the existing mechanism of federal regulatory agency action reviewed by the U.S. Courts of Ap-

Trade Agreement, 27 CORNELL INT'L L.J. 141, 141 (1994).

196. *Id.* at 143.

197. Joe Cobb, *The Real Threat to U.S. Sovereignty*, Heritage Foundation Lecture, No. 497 (Aug. 1, 1994). GATT was later ratified by a lame-duck session of the 103d Congress on December 1, 1994. 140 Cong. Rec. S15379 (1994).

198. See David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 464-65 (1994) (describing two ways that the common market could effect domestic regulation).

199. *Id.* at 469.

200. *Id.* at 465.

201. *Id.*

peals.²⁰² Setting aside the more immediate constitutional issue under Article III,²⁰³ NAFTA raises profound questions for the future of constitutional sovereignty in the United States and how these transnational arrangements will be reconciled to our federalism.²⁰⁴ The treaty's provisions for binational dispute resolution and supranational administrative-type appeals are far too elaborate for detailed description here. But the treaty promises to accelerate federalization in many traditionally domestic areas of the law, including investments, intellectual property, market regulations, and trade remedies.²⁰⁵

One of the most controversial aspects of the proposed GATT is the World Trade Organization (WTO), which presents an even greater and immediate challenge to existing understandings of sovereignty. Each member nation will have one vote in the WTO, which, under the GATT agreement, is given exclusive authority to interpret the treaty and its own power. GATT does not allow reservations. Thus, Congress cannot pass legislation to change the agreement. Furthermore, a provision obliges each member nation to ensure conformity of its law, regulations, and administrative procedures to the agreement. Thus, Congress is not given a role to change domestic laws, federal and state, that contravene the agreement.

Prominent conservative and liberal commentators have expressed their concern for the diminution of sovereignty involved in the agreement.²⁰⁶ GATT will limit federal sovereignty to the ex-

202. See generally Metropoulos, *supra* note 195, at 142-49 (describing NAFTA's binational panel system).

203. See generally *id.* at 159-68 (concluding that the panel system should be invalidated because it conflicts with Article III).

204. *Id.* at 169.

205. See Kristin L. Oelstrom, Note, *A Treaty for the Future: The Dispute Settlement Mechanisms of the NAFTA*, 25 L. & POL'Y INT'L BUS. 783, 783 (1994) (stating that NAFTA will have "significant ramifications in areas such as market access, investment, intellectual property, and trade remedies"); see generally David A. Gantz, *Resolution of Investment Disputes Under the North American Free Trade Agreement*, 10 ARIZ. J. INT'L & COMP. L. 335 (1993) (discussing the NAFTA provisions for settlement of investment disputes); Michael H. Greenberg, *Chapter 19 of the U.S.-Canada Free Trade Agreement and the North American Free Trade Agreement: Implications for the Court of International Trade*, 25 L. & POL'Y INT'L BUS. 37 (1993) (presenting as a positive alternative dispute resolution device the binational dispute provisions in the FTA and NAFTA for antidumping and countervailing duty determinations); Homer E. Moyer, Jr., *Chapter 19 of the NAFTA: Binational Panels as the Trade Courts of Last Resort*, 27 INT'L LAW. 707 (1993) (discussing the functioning and validity of the NAFTA Chapter 19 binational panel process for antidumping and countervailing duty cases).

206. See David S. Cloud, *Critics Fear GATT May Declare Open Season on U.S. Laws*,

tent that Congress acquiesces. It will limit state sovereignty by federal preemption of state laws enforced by mechanisms in the agreement that create a duty of signatory nations to bring into compliance offending "subfederal" laws. This will also oblige federal courts to interpret and defend the treaty and the implementing federal legislation.

Moving past federalization to internationalization of the law has even more profound implications for the future of constitutional sovereignty in the United States.²⁰⁷ It is one thing to reassign sovereign power from the state level to the federal level; it is something altogether different to move it to an international institution. At the level of international dispute resolution, even the federal judicial branch is one interface removed from decisionmaking authority. This is a kind of "preemption squared." These treaties authorize dispute resolution by international entities and the authorization is exclusive of domestic state and federal courts.

Admittedly, I lack the knowledge and sophistication to say more about the future of international law. To me, international law today and treaties such as NAFTA and GATT are like a game of poker in an Old West saloon: the game is about money and there are guns on the table; everyone expects everyone to cheat and everyone does; fights always break out. I submit, however, that the state and federal courts need to be looking over the shoulder of Congress and the President to understand what cards they are playing and what is at stake in terms of their judicial future. While this is especially true of the states, this should be a larger concern for all Americans. Ask the antifederalists what can happen to sovereignty when the commerce power is transferred from one level of government to another.

2. Violent Crime Control and Law Enforcement Act of 1994

By far, most criminal prosecutions take place in state court.²⁰⁸

CONG. Q., July 23, 1994, at 2005, 2005; David Shribman, *GATT: Vilifying the Inscrutable*, BOSTON GLOBE, July 22, 1994, at 3 (identifying Phyllis Schlafly and Ralph Nader as among those who feel that the WTO would compromise American sovereignty).

207. See Peter du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J.L. & PUB. POL'Y 137, 143 (1992) (stating that GATT proposals superimpose international norms on states while national laws and norms imposed by federalism are promulgated by our own government).

208. "Nineteen out of twenty crimes in America are still handled by the States." H. Scott Wallace, *When More is Less: The Drive to Federalize Is a Road to Ruin*, 8 CRIM. JUST. 8 (Fall 1993).

The historical and traditional understanding is that the police power to promulgate and enforce substantive criminal law is one of the primary responsibilities of the sovereign states. The federal role in criminal law is limited by constitutional design to uniquely federal interests or policies that are otherwise beyond the states. While there are no federal common law crimes, federal courts are given exclusive federal question jurisdiction over all criminal offenses against the statutes of the United States.²⁰⁹

The Department of Justice and the typical U.S. Attorney's Office have written prosecution guidelines, often labelled "declination policies," that describe principles for informed exercise of federal prosecutorial discretion.²¹⁰ Of course, some offenses are exclusively federal crimes, much like the exclusive federal question jurisdiction on the civil side.²¹¹ For these federal offenses, the issue is not "where" but "whether" to prosecute. Other federal crimes do not have this exclusivity and the "where" question must be answered. For some of these, there are "special federal interests" that create a federal court priority.²¹² For example, when the crime is an interstate matter the prosecution favors federal court because of the nationwide presence and authority of federal law enforcement agencies and the procedural advantages of preparing and trying the prosecution. Federal jurisdiction and procedures may also afford the prosecutor more opportunities to consolidate cases and offenses than comparable state procedures. Sentencing law differences, including the federal guidelines and mandatory minima, play a role in the decision. Finally, political priorities established in Washington, D.C. dictate that certain prosecutions be filed in federal courts. These include "Operation Triggerlock" (cases dealing with firearms in violent and drug-related crimes), "Operation Fasttrack" (cases involving bank fraud, thefts, and embezzlement), and the savings & loan crisis. The near future likely will bring such programmatic priorities for health care fraud and environmental crimes. What are perceived as "big cases," in terms of the harm or amount of drugs or funds involved, have a unique claim on

209. WRIGHT, *supra* note 99, at 124-26.

210. John G. Douglas, *Deciding Which Cases to Prosecute in Federal Court: The Federal Prosecutor's Perspective* (text available with author).

211. Federal offenses include crimes occurring on military installations or other federal enclaves, national security offenses (espionage), customs and import-export crimes, escapes from federal prisons, obstruction of justice, and perjury in federal court.

212. These crimes include counterfeiting U.S. currency, threats or assaults on federal officers, fraud or theft directed at federal agencies and programs, such as Social Security.

federal courts.

Most of these prosecutorial decisions are predictable, but discretion still exists for determining where a criminal case will be prosecuted. This often depends on practical realities, including the relative resources of the Department of Justice and local U.S. Attorney's office, the agency relations, and forfeiture incentives. This last incentive, federal forfeiture of assets, is decreased by the federal authorities sharing the assets seized with their state counterparts.

Recently, there has been accelerating congressional momentum to federalize more areas of traditional state concern with the consequence of shifting large numbers of cases from state dockets to federal dockets.²¹³ This trend is most pronounced in the criminal law. The trend is attributable to various factors, including the zealousness of federal prosecutors, the expansiveness with which federal courts have interpreted federal criminal statutes, the urgency of the states and local governments for federal assistance, and the resulting congressional-political interest in the criminal justice system.²¹⁴ Further exacerbating the effect of this trend has been an increase in the overall volume of criminal filings and appeals.²¹⁵

213. See SCHWARZER & WHEELER, *supra* note 178, at 1 (discussing the growing concern among judges and commentators over the trend toward federalization of state crimes and civil causes of action); see, e.g., Anti-Car Theft Act of 1992, Pub. L. No. 102-519, 106 Stat. 3384 (codified in scattered sections of 15 U.S.C. (Supp. V 1993)) (federalizing the traditional state concern of auto theft); Animal Enterprise Protection Act of 1992, 18 U.S.C. § 43 (Supp. V 1993) (addressing attacks against animal enterprises); Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (codified in scattered sections of 18 U.S.C. (Supp. III 1991) and 42 U.S.C. (Supp. III 1991)) (imposing a criminal penalty for flight to avoid payment of child support); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified in scattered sections of 18 U.S.C. (Supp. III 1991)) (providing state law enforcement with assistance in establishing drug-free school zones); Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, 100 Stat. 1213 (providing penalties for fraud and related activities in regards to computers and related devices); False Identification Crime Control Act of 1982, 18 U.S.C. §§ 1028, 1738 (1988) (providing penalties for crimes involving false identification); Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3568 (codified in scattered sections of 28 U.S.C. (1988) and 42 U.S.C. (1988)) (establishing a national system for locating parents and their children to prevent custody-related kidnappings).

214. See Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 117-18 (1987) (listing three reasons for increasing federal court involvement in criminal prosecutions: desire of state and local governments to receive federal assistance, congressional interest in new criminal legislation, and broad interpretations of federal criminal statutes by federal courts); Stanley Marcus, *The Federalization of State Law*, PROC. OF THE W. REGIONAL CONF. ON ST.-FED. JUD. RELATIONSHIPS, June 4-5, 1993, at 74.

215. SCHWARZER & WHEELER, *supra* note 178, at 3.

The state justice system funding crisis discussed above is an additional factor leading to the case shift from state to federal dockets. The attitude is that the federal prison system is larger and better funded and more easily expanded than the typical state prison. A state prosecutor is motivated to place new offenders on a federal track if, as a practical matter, the conviction of one state prisoner would mean the release of another state prisoner to make room for the new convict. The sense in the criminal justice system is that states are unable to build prisons as easily as the federal government.

Another factor accounting for the state to federal shift that is obvious, yet has escaped analysis for the most part, is the ever increasing attorney-power in the federal prosecutorial function. The Department of Justice itself has experienced personnel increases but even more noteworthy is the addition in recent years of very large numbers of Assistant United States Attorneys in the districts. Each new federal prosecutor position by definition increases the capacity of the federal system to bring prosecutions. This inevitably increases the potential for federalization through federal prosecutorial discretion and cooperation with state prosecutors. Furthermore, we can expect more of this potential to be realized when the announced justification for the new federal positions is generally to assist the states to deal with the crime problem and when individual United States Attorneys adopt corresponding local agendas to coordinate federal prosecutions with state and local officials. Federal-state cooperation and coordination in law enforcement and prosecution more often than not result in more criminal filings in U.S. district courts. This is not necessarily to criticize these developments but to point out that their impact on the federalization of the criminal law is pronounced.

Crime is costly and so is fighting crime. According to official estimates, the annual cost of crime in the United States is in excess of \$163 billion.²¹⁶ In the summer of 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994²¹⁷ and committed an additional \$30 billion over the next four years to fight crime. The special trust fund established under that act will

216. Pierre Thomas, *Beyond Grief and Fear is Crime's Bottom Line*, WASH. POST, July 5, 1994, at A1, A6.

217. Pub. L. No. 103-322, 108 Stat. 1796 (1994). See H.R. CONF. REP. NO. 103-711, 103d Cong., 2d Sess. (1994) (discussing the Violent Crime Control and Law Enforcement Act of 1994).

amount to about 2% of the federal budget for the period.²¹⁸

For the states, the new Act is something of a mixed blessing. The legislation creates large numbers of federal grant programs, but the state and local governments are expected to come up with matching funds and eventually take over full funding.²¹⁹ For the courts, the Act manifests an "hourglass problem" because "[t]he crime bill devotes new resources to police and prisons but little to the court systems that move offenders from arrest to incarceration."²²⁰ Recognizing that the Act will dramatically increase demands on the judicial system, Congress will make available over the next five years \$200 million for the federal courts and \$150 million for the state courts. This is only \$350 million out of \$30 billion allocated in the Act.²²¹

The 1994 legislation resembles a nesting doll, as the Act contains multiple independent statutes on divergent topics arranged in thirty-three sections. As evidence of this diversity, consider the following examples of federalization of traditional state matters: the Recreational Hunting Safety and Preservation Act;²²² the Senior Citizens Against Marketing Scams Act;²²³ the Missing Alzheimer's Disease Patient Alert Program;²²⁴ the Motor Vehicle Theft Prevention Act;²²⁵ the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act;²²⁶ the Driver's Privacy Protection Act;²²⁷ the Computer Abuse Amendments Act;²²⁸ the Drunk Driving Child Protection Act;²²⁹ and the Drive-By Shooting Prevention Act.²³⁰

218. George Hager, *The Latest Untouchable Fund*, CONG. Q. WKLY, Aug. 6, 1994, at 2252.

219. Holly Idelson, *Effects of Costly Crime Bill Will Be Tough to Measure*, CONG. Q. WKLY., Aug. 6, 1994, at 2251.

220. *Id.* at 2253.

221. See Violent Crime Control and Law Enforcement Act of 1994 §§ 190001, 210602. By comparison, law enforcement will get \$8.8 billion for additional police and corrections will get \$7.9 billion for more prisons. David Masci, *The Modified Crime Bill*, CONG. Q. WKLY., Aug. 27, 1994, at 2490.

222. Violent Crime Control and Law Enforcement Act of 1994 § 320801 (codified at 16 U.S.C.A. § 5201 (West Supp. 1994)).

223. *Id.* § 250001 (codified at 18 U.S.C.A. § 2325 (West Supp. 1994)).

224. *Id.* § 240001 (codified at 42 U.S.C.A. § 14181 (West Supp. 1994)).

225. *Id.* § 220001 (codified at 18 U.S.C.A. § 511 (West Supp. 1994)).

226. *Id.* § 170101 (codified at 42 U.S.C.A. § 14071 (West Supp. 1994)).

227. *Id.* § 300001 (codified at 18 U.S.C.A. § 2721 (West Supp. 1994)).

228. *Id.* § 290001 (codified at 18 U.S.C.A. § 1030 (West Supp. 1994)).

229. *Id.* § 100001 (codified at 18 U.S.C.A. § 13 (West Supp. 1994)).

230. *Id.* § 60008 (codified at 18 U.S.C.A. § 36 (West Supp. 1994)).

More to the point, there are at least seven particular features of the 1994 legislation that are sure to act like magnets to attract state cases to federal courts: (1) new harsher provisions relating to drug offenses;²³¹ (2) new federal offenses for various types of participation in criminal street gangs, including a provision that permits juveniles as young as thirteen years old to be prosecuted as adults for certain serious violent felonies;²³² (3) the so-called "three strikes and you're out" provision, which mandates a life sentence for conviction of a third violent felony;²³³ (4) new federal bans on assault weapons;²³⁴ (5) the federal sentencing enhancement for hate crimes;²³⁵ (6) the new Violence Against Women Act that makes it a federal crime to commit certain interstate acts of domestic violence and creates a civil remedy for gender-motivated violence;²³⁶ and (7) the sixty new federal death penalties that include carjacking and drive-by shootings when a death occurs.²³⁷

One of the major themes in the debate leading up to the 1994 Act and the legislation itself is the emphasis on the role and responsibility of the federal government for dealing effectively with the drug abuse problem. Certainly, the enforcement of the drug laws is a shared responsibility of both state and federal courts.²³⁸ In the future, however, the federal courts may become a casualty of the so-called "war on drugs," which has as one of its chief strategies the federalization of many drug offenses that used to be handled in state courts. This has led Chief Justice Rehnquist to express his concern that federal courts were being transformed into "national narcotics courts."²³⁹

Drug cases not only increase workload. Because of the Speedy Trial Act,²⁴⁰ they take precedence and actually displace other cas-

231. *Id.* §§ 90101-90107 (imposing consecutive sentences for drug related offenses).

232. *Id.* § 140001 (codified at 18 U.S.C.A. § 5032 (West Supp. 1994)).

233. *Id.* § 70001 (codified at 18 U.S.C.A. § 3559 (West Supp. 1994)).

234. *Id.* § 110101 (codified at 18 U.S.C.A. § 921 (West Supp. 1994)).

235. *Id.* § 280003 (codified at 28 U.S.C.A. § 994 (West Supp. 1994)) (providing enhancement of not less than three offense levels).

236. *Id.* § 40001 (codified at 18 U.S.C.A. §§ 2247-2248 (West Supp. 1994)).

237. *Id.* § 60001 (codified in scattered sections of 18 U.S.C.A.).

238. McKusick, *supra* note 27, at 13; J. Clifford Wallace, *Tackling the Caseload Crisis*, A.B.A. J., June 1994, at 88.

239. Rehnquist, *supra* note 27. Consider some of the Chief Justice's statistics. Between 1980 and 1990, total criminal case filings increased 60% in the federal courts; drug cases increased 290%. The criminal docket today is about 15% of the district courts' caseload. But time and motion studies have determined that criminal cases occupy approximately 48% of the federal judge's time spent judging (more than 80% in some districts).

240. 18 U.S.C. §§ 3161-3174 (1974).

es on the civil docket. Another part of the problem is the mandatory minimum sentences required under the Sentencing Reform Act of 1984.²⁴¹ These have fueled the trend toward federalizing what used to be state possession crimes. If the federal statutes are relatively "tougher," then state and federal prosecutors are more likely to exercise their charging discretion to funnel more and more drug cases into federal courts.

The familiar overlap of prosecutorial responsibility in the drug laws is growing in other areas of criminal law, particularly gun control and violent crime which are becoming a national problems requiring federal solutions. The 1994 Act is the latest in the series of federal statutes that continue the trend of federalizing the criminal law. Perhaps as a result of the difficulty of passage and the need for compromise, the new Act has something for everyone.²⁴² This is not a strength. No one knows if the legislation will reduce violent crime and the impact will be difficult to measure. One of the most likely consequences of legislation and programs such as the 1994 Crime Control Act will be even greater public expectations for federal solutions to the serious problems facing society. This sort of legislation assigns a secondary role to the states, to act as grantees and agents of the congressional principal.²⁴³ Federal judges themselves are deeply concerned about these legislative developments.²⁴⁴ Like it or not, the future promises even more of this federalization.²⁴⁵

241. 18 U.S.C. §§ 3551-3559 (1984).

242. Not everyone is impressed:

I feel a lot safer now that the crime bill has passed. Now it will be a federal crime punishable by death to commit murder in an airport, unless the murder is committed during a labor dispute. At long last, America will have a Drug Free Truck Stop Act and a Missing Alzheimer's Disease Patient Alert Program. Crooks will spend an extra year in jail for offenses involving the Congressional Medal of Honor. And genocide—yes, genocide—will be a federal crime punishable by death or a fine not to exceed \$1 million, or both. Even if it is committed during a labor dispute.

Michael Grunwald, *The Crime Behind the Crime Bill*, BOSTON GLOBE, Sept. 1, 1994, at 61.

243. An example is the appropriation of nearly \$10 billion for new state prison construction that is made available only to states that adopt tough "truth-in-sentencing" laws. Masci, *supra* note 221, at 2490.

244. See Henry J. Reske, *A Bigger Role for the Feds*, A.B.A. J., Oct. 1994, at 14, 14 (pointing out the increased strain on the federal courts due to the increase in the number of federal crimes); Henry J. Reske, *Judges Irked by Tough-On-Crime Laws*, A.B.A. J., Oct. 1994, at 18, 18 (criticizing the federal imposition of sentencing guidelines and mandatory minimum sentences).

245. See Wallace, *supra* note 208, at 8 (noting that criminal legislation is experiencing

3. Health Care

Congress did not enact a comprehensive federal health care bill in 1994. But some limited legislation is almost a sure thing before too long, and there is a strong likelihood that Congress will completely federalize health care sometime in the future.²⁴⁶ The debate has subsided, but proponents promise to return.²⁴⁷

The numbers are staggering to contemplate.²⁴⁸ Adjusting for inflation, since 1950 health care expenditures have risen *each year* by 5.5% overall and 4.1% per capita.²⁴⁹ The proportion of GNP has tripled since 1950 and expenditures devoted to health care are projected to reach 15% of GNP in the year 2000.²⁵⁰ In 1994, Americans will spend one trillion dollars on health care, and yet, according to the Clinton administration's estimates, 37 million Americans are without health care and an additional 25 million have inadequate coverage.²⁵¹

Even if there is not federal legislation, we can expect that there will be more disputes and more litigation as costs of health care otherwise continue to rise, and individuals, employers, and insurers try to keep ahead and compete among themselves to avoid higher costs.²⁵² Furthermore, it should be noted that the health care field

increasing momentum in Congress). There are no constitutional limits left. See James M. Maloney, *Shooting for an Omnipotent Congress: The Constitutionality of Federal Regulation of Intrastate Firearms Possession*, 62 *FORDHAM L. REV.* 1795, 1816-27 (1994) (arguing that Congress should have to establish only a minimal nexus to interstate commerce in order to regulate criminal activity pursuant to the Commerce Clause). But see *United States v. Lopez*, 2 F.3d 1342, 1342 (5th Cir. 1993) (holding the Gun-Free School Zones Act unconstitutional because it could not be passed pursuant to the Commerce Clause), *cert. granted*, 114 S. Ct. 1536 (1994).

246. See David S. Cloud, *Mitchell Trying to Find a Graceful Exit*, *CONG. Q.*, Sept. 24, 1994, at 2693 (noting the congressional efforts to overcome the stalled health care legislation agenda); Alissa J. Rubin, *Prospects for Major Overhaul Fade as Senate Goes Home*, *CONG. Q.*, Aug. 27, 1994, at 2486 (reporting Democratic conciliations that would move the stalled health care debate away from universal coverage towards a more broadly supported plan).

247. Alissa J. Rubin, *Overhaul Issue Unlikely to Rest in Peace*, *CONG. Q.*, Oct. 1, 1994, at 2797. See also Peter MacPherson, *Some Modest Proposals on Republican Table*, *CONG. Q.*, Dec. 31, 1994, at 3611 (stating that Republicans' agenda includes health care reform proposals).

248. See Fuller & Boersema, *supra* note 16, at 223 (noting the steady increase in health care costs, from \$559 billion in 1988 to \$685 billion in 1990).

249. *Id.*

250. *Id.*

251. WHITE HOUSE DOMESTIC POLICY COUNCIL, *HEALTH SECURITY—THE PRESIDENT'S REPORT TO THE AMERICAN PEOPLE* at xiii (1993).

252. Fuller & Boersema, *supra* note 16, at 225.

already has been federalized to a large degree.²⁵³ Medicare provides health insurance for some 33 million Americans, most of whom are over the age of 65.²⁵⁴ Medicaid is a joint federal-state program that subsidizes the elderly and the poor through a publicly financed program.²⁵⁵ The Employee Retirement Income Security Act (ERISA) establishes administrative and substantive requirements for the private administration of employee benefit plans, particularly pensions, with a few applications to health insurance that have been interpreted to preempt some state legislative efforts to regulate health care.²⁵⁶ Most recently, the Americans With Disabilities Act of 1990, which protects handicapped persons from discrimination, has been interpreted to preempt state health programs that establish priorities for coverage.²⁵⁷

The federalism implications to be expected from greater federalization of health care ought to be obvious.²⁵⁸ State governments act as major regulators, employer-payers, and providers of health care. Often overlooked is the fact that the states at times operate as public interest groups, modern Madisonian factions, lobbying Congress. Some states, in fact, have attempted a comprehensive reform of the health care system.²⁵⁹ Thus, the stakes are high for everyone concerned: the states, the federal government, and individual Americans. Federalizing 15% of the GNP will be a large and complicated undertaking.

No one can be sure what, if any, federal program will be enacted in the near or distant future. We can be sure of the fact that any plan will create a new federal bureaucracy.²⁶⁰ The Clinton administration put forward a 1462-page plan that called for a colossal bureaucracy.²⁶¹ Former Senate Majority Leader Mitchell cut that down to a mere 1410 pages, with dozens of new federal and

253. See Wendy E. Parmet, *Regulation and Federalism: Legal Impediments to State Health Care Reform*, 19 AM. J. L. & MED. 121, 130-44 (1993) (surveying existing federal health care laws).

254. *Id.* at 130-31.

255. *Id.* at 132-33.

256. *Id.* at 132-40.

257. *Id.* at 140-42.

258. See Fernando R. Lague, *Federalism Myth: States as Laboratories of Health Care Reform*, 82 GEO. L.J. 159, 160-61 (1993) (believing states should serve as health reform "laboratories").

259. *Id.* at 179-89 (describing proposed statewide plans for Hawaii and Oregon).

260. Dana Priest, *The Side Effects of Health Care Reform*, WASH. POST NAT'L WKLY., Aug. 15, 1994, at 31.

261. WHITE HOUSE DOMESTIC POLICY COUNCIL, *supra* note 251.

state agencies.²⁶² These new agencies “would have untested authority to centralize, reorganize, monitor and enforce the way medical care is bought, sold, and to a lesser extent practiced in this country.”²⁶³ These two proposals and the other proposals being debated have in common the imposition of new responsibilities on the state governments.²⁶⁴ Indeed, one of the most difficult issues facing the Congress is just how much regulatory authority should be imposed on the states and what sort of program diversity should be allowed.²⁶⁵ One commentator has analyzed the various proposals and found seven ways the plans arguably intrude on state sovereignty: (1) federal regulation of employee benefits of nonfederal public sector employees; (2) unfunded federal mandates for state regulation; (3) mandated state regulation and threatened preemption upon state default; (4) mandated state regulation and threatened the states surcharges for federal regulation upon state default; (5) mandated state regulation and threatened federal tax on private actors upon state default; (6) imposition of federal taxes on the private sector upon a failure of the state to regulate; and (7) proffered financial incentives for state regulation.²⁶⁶

Finally to be considered is the huge implication for court case-loads from a new program of this magnitude.²⁶⁷ Suppose there are four billion claims in a given year. We might expect 90% of those to be routinely handled. That leaves only 10%, or 40 million claims that are denied and then contested within the newly created bureaucracy. Suppose only 1 out of 40, a conservative estimate, survive agency review in the form of some petition for judicial review. This means 40,000 new court proceedings each year in the form of appeals from agency action. That is close to the total number of appeals currently decided annually by the U.S. courts of appeals.

Both the Conference of Chief Justices and the Judicial Conference of the United States separately considered and adopted four principles for health care reform as it affects the court system:

262. S. 2357, 103d Cong., 2d Sess. (1994) (short title: “Health Security Act”).

263. Priest, *supra* note 260, at 31.

264. H.R. 3600, 103d Cong., 1st Sess. (1994).

265. Candace Hoke, *Constitutional Impediments to National Health Reform: Tenth Amendment and Spending Clause Hurdles*, 21 HASTINGS CONST. L.Q. 489, 499 (1994).

266. *Id.* at 501-03.

267. Telephone Interview with Professor John B. Oakley, University of California at Los Angeles (Aug. 10, 1994).

1. Full exhaustion of administrative remedies for benefit denial claims should be required.

2. Following exhaustion of administrative remedies, and consistent with general principles of federalism, state courts should be the primary forum for review of benefit denial claims.

3. Traditional discrimination claims should be handled differently from benefit denial claims based on issues such as medical necessity.

4. To ensure the effectiveness of the enforcement provisions of any health care legislation, it is critical that sufficient resources be provided to the responsible administrative and judicial entities.²⁶⁸

These principles are intended to be limited to court jurisdiction and procedures and are not addressed to the substantive policy issues involved in health care reform.²⁶⁹ The jurisdictional preference for the state courts is recognition that "state courts possess the capability and practical expertise to fully and fairly adjudicate health care cases based on a long tradition of resolving medical liability and health insurance cases."²⁷⁰ Furthermore, "the geographical distribution of state courts provides greater accessibility for adjudication of claims and affords greater control at the state level to ensure that local plans fully reflect and meet local needs."²⁷¹ It remains to be seen if Congress will listen to the advice of the judges and adhere to these principles.²⁷² Finally, it should be noted that federal reform of state medical malpractice law is a significant part of the larger debate over health care reform.²⁷³ All of the majority proposals have provisions about the subject, although there is great variety in the proposals over such details as caps on noneconomic damages, limits on attorneys' contingent fees, alternative dispute

268. *Judicial Conference Adopts Principles for Health Care Reform*, THE THIRD BRANCH, Aug. 1994, at 1.

269. *Id.*

270. *Id.* at 2.

271. *Id.*

272. *See id.* at 1 (explaining that the House Judiciary Committee marked up a portion of the Health Security Act and approved an amendment that only partially embraced the principles).

273. *See generally* Julie Cohen, *Tort Reform in Play in Health Debate*, LEGAL TIMES, Aug. 22, 1994, at 1, 8, 11 (using federal reforms to preempt state liability law is controversial).

resolution, and preemption.

4. A Federal Products Liability Law

Product safety law is a creation of both federal agency regulation and state common law tort. Federal law currently preempts state products liability law in a large number of cases because "[f]ederal agencies now regulate the manufacture, design, and labeling of hundreds of consumer products."²⁷⁴ Consider just a few examples from everyday life: the Consumer Product Safety Commission promulgates standards for a number of consumer products;²⁷⁵ the National Highway Transportation Safety Administration develops safety standards for automobiles;²⁷⁶ the Food and Drug Administration regulates drugs and food labeling;²⁷⁷ the Department of Agriculture regulates food production and marketing;²⁷⁸ and Congress imposes statutory requirements for labeling tobacco products and alcohol.²⁷⁹

Proposals for a comprehensive federal products liability statute that would preempt state common law have been before the Congress since 1979.²⁸⁰ In 1977, a Task Force of the Department of Commerce issued a report concluding that business and legal concerns about the state tort systems were well-founded: uncertainty and diversity among the states' laws increased costs of insurance and litigation costs.²⁸¹ Since then, consumer groups and business interests have been debating proposals alongside lawyers and scholars.²⁸² In 1993 the Senate ignored the proposal for the tenth year in a row.²⁸³ But the shrinking margin of opposition has fortified the hardcore powerful supporters of the measure.²⁸⁴ The current

274. Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.C. L. REV. 187, 189 (1993) (citing Barbara L. Atwell, *Products Liability and Preemption: A Judicial Framework*, 39 BUFF. L. REV. 181, 181 (1991)).

275. 15 U.S.C. §§ 2051, 2056, 2058 (1988 & Supp. IV 1992).

276. 15 U.S.C. §§ 1381-1420 (1988 & Supp. IV 1992).

277. 21 U.S.C. §§ 301-394 (1988 & Supp. IV 1992).

278. 21 U.S.C. §§ 451-470, 601-695 & 1031-56 (1988 & Supp. IV 1992).

279. 15 U.S.C. §§ 1331-1341, 4401-4408 (1988 & Supp. IV 1992); 27 U.S.C. §§ 213-219a (1988 & Supp. IV 1992).

280. Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1122 n.4 (1988).

281. U.S. DEP'T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCTS LIABILITY FINAL REPORT (1977).

282. Diane E. Mitts, Note, *The Products Liability Crisis: A Federal Statutory Solution*, 1983 U. ILL. L. REV. 757, 758.

283. Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359, 367 (1994).

284. Mark A. Hoffman, *Product Liability Reform Bill Killed: But Backers Point to*

Congress has such a bill before it.²⁸⁵ The question is not if there will be federal legislation, but when. The answer appears to be within the future contemplated in this paper.

Just what will be included in the federal statute is a more difficult prediction. The latest bill fully preempts state products liability law but denies any jurisdiction to federal courts.²⁸⁶ It sets forth expedited settlement procedures, including ADR and offer of judgment rules.²⁸⁷ Issues of seller liability, punitive damages, and time limits on liability are also provided.²⁸⁸ There are an estimated 40,000 products liability suits each year that would be covered by any federal legislation.²⁸⁹

To be sure, there are public policy issues of certainty and uniformity in this area of the law; however, any "[p]roposal . . . that preempt[s] an area of traditional state concern should bear a heavy burden of justification for overriding state autonomy."²⁹⁰ But here, too, the effect of the globalization of the economy will be felt on domestic law.

5. Statutory Overrulings of the Supreme Court

A rather fascinating recent development fits here in the discussion of federalization of the law: attempts by Congress to overrule constitutional holdings of the Supreme Court by passing statutes. The hornbook proposition, of course, is that Congress always has the last word on what a statute means.²⁹¹ If the courts, state or federal, interpret a federal statute in a manner not to the liking of

Shrinking Margin of Opposition, BUS. INS., Sept. 14, 1992, at 1.

285. The proposal is known as the Product Liability Fairness Act, S. 687, 103d Cong., 1st Sess. (1993); see Robert J. Samuelson, *Lawyer Heaven*, WASH. POST WKLY., June 27, 1994, at 28 (discussing reaction of legal community to Product Liability Fairness Act).

286. S. 687, 103d Cong., 1st Sess. (1993).

287. *Id.*

288. *Id.*

289. Samuelson, *supra* note 285, at 28.

290. Harvey S. Perlman, *Products Liability Reform in Congress: An Issue in Federalism*, 48 OHIO ST. L.J. 503, 507 (1987).

291. See generally William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) (examining the impetus for and effect of congressional overriding of Supreme Court decisions through revision of statutes); Abner J. Mikva & Jeff Bleich, *When Congress Overrules the Court*, 79 CAL. L. REV. 729 (1991) (comparing Congress' recent overruling of the Supreme Court through the 1991 Civil Rights Act to similar historical congressional overrulings); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Interpretations*, 65 TEMP. L. REV. 425 (1992).

Congress, then Congress simply can amend the statute to disapprove of the courts' handiwork. At times, however, Congress has attempted to have the last word on constitutional issues as well by passing statutes with the intended effect of undoing constitutional interpretations made by the Supreme Court.²⁹²

The latest example of this technique is the Religious Freedom Restoration Act of 1993.²⁹³ With this act, Congress invoked the power of Section 5 of the Fourteenth Amendment to disapprove of the Supreme Court's holding in *Employment Division v. Smith*,²⁹⁴ the 1990 peyote case. Utilizing a test created by earlier Supreme Court precedents, the statute dictates a less deferential compelling interest test of strict scrutiny, even though the Supreme Court applied a lower, more deferential standard of judicial review in *Smith*.²⁹⁵ Technically, Congress did not overrule the Court's decision. That power does not exist except through Article V. What Congress did with this statute was to create a new federal statutory right or cause of action, enforceable in state or federal court, after the Court had refused to find it in the Constitution. Statutes such as the Religious Freedom Restoration Act, therefore, are a variation on the federalization theme: the Supreme Court's interpretation of the Constitution is the occasion for Congress to enact federal legislation ratcheting up individual rights.

If the Supreme Court upholds this legislative technique, we can expect similar federal statutes in the future. Consider two illustrative possibilities. A bill currently before Congress, entitled the Freedom of Choice Act,²⁹⁶ would restore, codify, and arguably

292. See Mark E. Herman, Note, *Looking Down From the Hill: Factors Determining Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543, 545 (1992) (examining the methods used by Congress to respond to the Court and the Court's acceptance or rejection of those methods).

293. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

294. 494 U.S. 872 (1990) (holding that laws not aimed at religion, but nonetheless having the effect of prohibiting the exercise of religion, are constitutional under the Free Exercise Clause).

295. This compelling interest test was derived by Congress from *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For a description and critique of *Smith* and of congressional response to *Smith*, see Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. REV. 221, 231. See also Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 B.Y.U. L. REV. 73, 85; Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can the Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1033 (1993).

296. S. 25, 103d Cong., 1st Sess. (1993). For background information on and a constitutional analysis of the Freedom of Choice Act, see Douglas A. Axel, Note, *The Constitu-*

broaden, the Supreme Court's holding in *Roe v. Wade*,²⁹⁷ with the effect of disapproving the Court's decisions since *Roe* that have narrowed and limited that 1973 holding.²⁹⁸ The measure would prohibit virtually every state regulation of abortion.²⁹⁹ Another bill that was introduced a year ago would have overruled the Supreme Court's 1989 decision invalidating Richmond, Virginia's affirmative action program for minority business set-asides in government construction contracts.³⁰⁰ The theory of this bill was that Congress has power under Section 5 of the Fourteenth Amendment to do more itself,³⁰¹ and the Section 5 power includes the authority to require state and local governments to do more than what the Supreme Court requires the state and local governments to do under the Equal Protection Clause.³⁰² Presumably, Congress could invoke this power to mandate affirmative programs that are neither required under the Constitution nor assented to by the state and local governments.³⁰³ Considering the federal legislature's track record with respect to federalism, one would not expect Congress to exercise this power and enact a new federalism statute restoring greater sovereignty to the states.³⁰⁴

B. Jurisdiction, Procedure, and Organization

Federal court jurisdiction, procedure, and organization will remain much the same in the future. The future will present fewer legislative surprises in these related procedural areas than we can expect from Congress on the substantive side just described.³⁰⁵

tionality of the Freedom of Choice Act of 1993, 45 HASTINGS L.J. 641 (1994).

297. 410 U.S. 113 (1973).

298. Cases having this narrowing effect on *Roe* include *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) and *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989). For additional discussion on the narrowing effects on *Roe*, see Axel, *supra* note 296, at 642.

299. S. 25, 103d Cong., 1st Sess. (1993); H.R. 3700, 103d Cong., 1st Sess. (1989).

300. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

301. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

302. See 135 CONG. REC. S7303-08 (daily ed. Jan. 3, 1989) (discussing S. 1234, 101st Cong., 1st Sess. (1989) and designating certain areas as high intensity drug trafficking areas in part because stopping the flow of drugs is a national, not a local, problem).

303. See Linda P. Campbell, *States Fear More Issues Becoming a Federal Case*, CHI. TRIB., July 15, 1990, at C5 (discussing the reactions of state and local governments to the *Metro Broadcasting* case).

304. But see Robert H. Freilich, *A Proposed Congressional "Statute of Federalism"*, 19 URB. L. 539, 551 (1987) (asserting that Congress must pass a statute of federalism now "[w]hile interest is high and the need great").

305. Without further attribution, this discussion relies on Thomas E. Baker, *A Catalogue*

1. Federal Questions

Federal question jurisdiction is at the "core of modern federal court jurisdiction."³⁰⁶ More than half of the cases brought in federal court each year are federal question cases.³⁰⁷ Many of the justifications offered for this jurisdiction revolve around a mistrust of state courts.³⁰⁸ The fear is that state courts might misapply federal law due to a lack of familiarity or sympathy with federal policies. Another justification historically offered for federal question jurisdiction is uniformity in the national law. However, efficiency might have been sacrificed in the attempt to achieve uniformity. It is not readily apparent that the Supreme Court has an easier time supervising the 94 districts and 13 courts of appeals than the 50 state supreme courts.

Federal courts can have exclusive jurisdiction over federal question cases or they can have jurisdiction concurrent with the state courts. In practice, most federal question cases involve concurrent jurisdiction.³⁰⁹ There is one general federal question jurisdiction statute,³¹⁰ and there are numerous special federal question jurisdiction statutes, some of which repeat the "arising under" terminology.³¹¹ Between 1875 and 1980, the general federal question jurisdiction statute carried with it an amount in controversy requirement.³¹² During that period, the special federal question statutes without the amount requirement were more significant.³¹³

of Judicial Federalism in the United States, 45 S.C. L. REV. (forthcoming 1995) (detailing conflicts between the state and national judicial branches).

306. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 252 (2d ed. 1994).

307. WRIGHT, *supra* note 99, at 101 n.3.

308. See AMERICAN LAW INSTITUTE, *supra* note 181, at 168 (arguing that at least some federal question cases should not be left to state courts to further interests of uniformity and "prompt vindication" of federally guaranteed rights).

309. See, e.g., 28 U.S.C. §§ 1332, 1343 (1988) (granting federal courts concurrent jurisdiction over diversity of citizenship actions and civil rights actions); *Tafflin v. Leevitt*, 493 U.S. 455, 467 (1990) (holding state courts have concurrent jurisdiction under federal anti-racketeering statutes).

310. 28 U.S.C. § 1331 (1988).

311. 28 U.S.C. §§ 1333 (admiralty), 1337 (commerce), 1338 (patents), 1339 (postal matters), 1343 (civil rights), 1344 (election disputes), 1352 (federal bonds) (1988).

312. See WRIGHT, *supra* note 99, at 190-95 (explaining the history of the amount in controversy requirement). A few special federal question statutes still have an amount in controversy requirement. See, e.g., 15 U.S.C. § 2310(d)(3)(A)-(B) (1988) (setting the amount in controversy requirement for consumer actions brought in federal courts at \$50,000 with a requirement that each individual claim have an amount in controversy of at least \$25).

313. WRIGHT, *supra* note 99, at 190-95.

Now that there is no amount in controversy required for general federal questions, logically there are two possible directions for future congressional reform. Congress could repeal all the special statutes and leave the general statute as a large gateway into federal court. Alternatively, Congress could repeal the general statute and preserve the special statutes as windows into federal court. The latter approach may be more consistent with the legislative intent behind the federal question scheme which establishes priorities for specific types of cases with special claims on the federal courts and treats the general statute as a residual category no longer needed.³¹⁴

If the substantive law is federal, federal question jurisdiction exists.³¹⁵ The United States government is the most frequent litigator in federal courts. Federal courts have jurisdiction over all federal criminal offenses,³¹⁶ and the United States is a party in more than one-fourth of the civil cases in district courts.³¹⁷ Therefore, whenever the law, criminal or civil, is "federalized," the caseload of federal courts grows proportionally. In the future, as more and more of every day life comes under the aegis and control of the federal government, there will be more and more federal cases, both by category and by number.³¹⁸

314. See Thomas E. Baker, *Thinking About Federal Jurisdiction—Of Serpents and Swallows*, 17 ST. MARY'S L.J. 239, 267-69 (1986) (describing the relevance of special federal jurisdiction statutes with or without the general federal jurisdiction statute).

315. Judge Posner takes the position: "I suggest that whenever the economic theory of federalism assigns substantive lawmaking responsibility to the federal government, the economic theory of federal jurisdiction would assign jurisdiction (whether exclusive or concurrent is an issue that I will not try to resolve in this talk) to the federal courts." Richard A. Posner, *Toward an Economic Theory of Federal Jurisdiction*, 6 HARV. J.L. & PUB. POL'Y 41, 46 (1982).

316. 18 U.S.C. § 3231 (1988).

317. WRIGHT, *supra* note 99, at 126.

318. The categories themselves are growing. What were once more limited forays into state policy have grown to be almost undefined federal domains, such as antitrust, the environment, and civil rights. See generally Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENV'T 847 (1982) (asserting that state governments should be allowed a larger role in federal environmental decisionmaking); Suzanne M. Boris, *The Age Discrimination in Employment Act: A Case Study*, 58 GEO. WASH. L. REV. 877 (1990) (analyzing application of Age Discrimination in Employment Act that Congress passed to provide older Americans the same employment protection that others receive under Title VII); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657 (1993) (urging a return to the federalism debate which prompted passage of the Sherman Act); John J. Sarno, *The Americans With Disabilities Act: Federal Mandate to Create an Integrated Society*, 17 SETON HALL LEGIS. J. 401, 417 (1993) (stating that the ADA may

2. Diversity Jurisdiction

Since the Judiciary Act of 1789 was enacted, federal courts have been afforded original jurisdiction of diversity cases. The present statute provides for jurisdiction over suits between citizens of different states or between a citizen of a state and an alien when the amount in controversy exceeds \$50,000.³¹⁹ The jurisdiction is concurrent and not exclusive in the federal court. There are two noteworthy judicially created federalism exceptions: even when the statutory requirements are satisfied, federal courts will decline to decide domestic relations cases or cases involving the probate of estates.³²⁰ Since 1938, federal courts have been obliged to follow the substantive law of the forum state and the national rules of procedure in diversity cases.³²¹

The debate over the advisability of diversity jurisdiction goes back to its inception and shows no sign of abating in the future. The contemporary debate is highly relevant to the future of the federal courts.³²² The parties to the debate generally have chosen sides so that state and federal judges and academics³²³ favor abolition while the practicing lawyers favor retention. The bar has been successful in persuading Congress to retain diversity jurisdiction. However, the discernible modern trend has been to limit and reduce the scope of jurisdiction, for example, by raising the threshold jurisdictional amount³²⁴ and defining citizenship for corporations more broadly.³²⁵

force a confrontation between Congress and the judiciary to determine the scope of congressional civil rights authority).

319. 28 U.S.C. § 1332(a) (1988).

320. See *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (thoroughly examining the domestic relations exception); *Phillips v. Rogenstiel*, 490 F.2d 509, 514 (2d Cir. 1973) (discussing the scope of these exceptions).

321. See Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH L. REV. 323, 324-28 (1991) (outlining the history of substantive and procedural law as it applied in federal diversity suits).

322. See FEDERAL COURTS STUDY COMM., *supra* note 36 (analyzing the past and present status of the federal courts and making suggestions for the future).

323. "Caveat lector! I am a notorious diversity abolitionist." Thomas E. Baker, *Federal Jurisdiction*, 16 TEX. TECH L. REV. 145, 164 (1985).

324. See Thomas E. Baker, *The History and Tradition of the Amount in Controversy Requirement: A Proposal to "Up the Ante" in Diversity Jurisdiction*, 102 F.R.D. 299, 302 (1984) ("As long as we have had federal courts, Congress has used the requirement of an amount in controversy to limit original and derivative access to the lower federal courts. Equally constant have been the increases in the financial threshold.").

325. WRIGHT, *supra* note 99, at 163-71 (detailing the history of corporate citizenship); cf. *Carden v. Arkoma Assocs.*, 494 U.S. 185, 189 (1990) (providing an in-depth analysis

Nonetheless, over the last few decades diversity cases still have accounted for about 20% of the district courts' docket and about 10-14% of the courts of appeals' caseload.³²⁶ In time and motion studies, diversity cases prove to be more demanding of federal judicial resources from the standpoint of both judges and juries.³²⁷ The most straightforward argument against diversity jurisdiction is that these figures disclose a discrete category of cases with a relatively weak claim on federal judicial resources. These cases nonetheless drain resources which are growing increasingly scarce relative to demand.³²⁸ Furthermore, administering this jurisdiction is inherently troublesome and it encroaches on state sovereignty.³²⁹ The advantage of having a tactical choice of forums, opponents of diversity argue, simply has become too costly. Finally, the consequences for the states' courts of abolishing diversity jurisdiction are not all that significant.³³⁰

Politically speaking, none of these arguments really matter. It is a very safe prediction that diversity jurisdiction will be around a long time into the future. Based on past congressional responses, we can expect that the jurisdiction will be curtailed in various ways short of outright abolition. Odds are, for example, that the longstanding anomaly that allows an in-state plaintiff to sue in federal court will be eliminated.³³¹ This will reduce the diversity caseload by one-third; this would amount to about 16,000 cases each year at present levels and future projections at a multiple of that total.³³² Congress also might get around to indexing the jurisdictional amount requirement so that the statutory requirement automatically keeps up with inflation.³³³ Like a balloon that bulg-

of corporate citizenship in diversity cases yet noting the Court has "just as firmly resisted extending that treatment to other entities").

326. FEDERAL COURTS STUDY COMM., *supra* note 36, at 423.

327. *Id.* at 423-24.

328. *See id.* at 427-29 ("[P]erhaps no other major class of cases has a weaker claim on federal judicial resources.").

329. *See* Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992) (supporting state sovereignty in a discussion on the federalism issues pervading diversity jurisdiction).

330. Victor Eugene Flango, *Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads*, 15 U. DAYTON L. REV. 405 (1990); Victor Eugene Flango, *How Would Abolition of Federal Diversity Jurisdiction Affect State Courts?*, 74 JUDICATURE 35 (1990).

331. *See Conference Supports Repeal of In-State Plaintiff Diversity Jurisdiction*, THIRD BRANCH, June 1994, at 4.

332. *Id.*

333. *Cf.* Baker, *supra* note 324, at 325 n.173 (stating a preference for more frequent congressional readjustments rather than indexing).

es at the opposite end of where it is squeezed, these curtailments likely will be more than offset in other areas.

A subcategory of diversity cases promises some far-reaching reform for federal court jurisdiction in the immediate future, although it is difficult to predict what form it will take. In May 1993, the American Law Institute approved the Proposed Final Draft of the Complex Litigation Project³³⁴ and proposed it to the Congress for enactment. It is the culmination of more than eight years of study and debate and, although there are those who would criticize the Project,³³⁵ the ALI proposal has been described as "the most innovative, resourceful, and ambitious work ever undertaken in the United States on the subject of multistate complex litigation."³³⁶ The ALI proposal would create new statutory standards for determining when complex litigation should be consolidated and new statutory mechanisms for transferring and consolidating related lawsuits within the federal system, from state courts to a federal court, from federal courts to a state court, and from state courts to a state court.³³⁷ The ALI Project will influence the approach courts take to these issues, even if Congress does not enact the ALI measure.³³⁸ But there is a good chance that federal legislation will be enacted and that it will look something like the ALI proposal.

The present paper is an inadequate compass within which to describe in great detail the 700-page ALI proposal, complete with explanatory comments and reporter's notes.³³⁹ There are some digressions beyond even law professors.³⁴⁰ What follows, therefore, is a summary of a summary.³⁴¹ The concept of complex litigation broadened over the life of the Project to include related claims being litigated by multiple parties in multiple fora, often dealing with difficult issues of causation or events over long periods of

334. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT (Proposed Final Draft 1993).

335. See, e.g., Linda S. Mullenix, *Unfinished Symphony: The Complex Litigation Project Rests*, 54 LA. L. REV. 977 (1994) (enumerating a variety of shortcomings of the project).

336. Symeon C. Symeonides, *The ALI's Complex Litigation Project: Commencing the National Debate*, 54 LA. L. REV. 843, 844 (1994).

337. See generally *id.* (providing an overview and analysis of these proposed mechanisms).

338. *Id.* at 844-45.

339. See generally Symposium, *American Law Institute Complex Litigation Project*, 54 LA. L. REV. 833 (1994) (including numerous viewpoints and critiques of the ALI project).

340. The author served as a member of the Consultative Group for the ALI project.

341. Symeonides, *supra* note 336, at 845-48.

time. Such litigation can be the result of a single event disaster, such as an airplane crash, or multiple events over a long period, such as the asbestos-in-the-workplace cases. These clustered litigations have the potential for relitigation of identical or nearly identical issues and require great private and public resources for their resolution.

Under the ALI proposal, a Complex Litigation Panel of federal judges will replace the existing Multidistrict Litigation Panel.³⁴² This Complex Litigation Panel will apply stated criteria for determining which cases are appropriate for consolidation and transfer. The Proposed Final Draft provides for different consolidation criteria and different procedures for transfer, depending upon whether the cases are being transferred and consolidated from multiple courts to a single court. Possible transfers include federal to federal, state to federal, federal to state, and state to state.³⁴³ A controversial provision would federalize the choice-of-law rules binding on federal and state transferee courts.³⁴⁴ The ALI's choice of law rules are so complex and elaborate that "depecage" (the application of the law of different states to different issues in the same claim) is predicted to be a common outcome.³⁴⁵

Even critics of the ALI Project, who complain that the proposal has too much of the smell of the scholar's lamp, recognize there is a crying need for a procedure of this kind, if not this scope, and experts expect that sooner or later Congress will visit the area with a federal statute.³⁴⁶ If the Congress takes the ALI approach or something like it, then "the dominant intersystem flow of cases would be from state courts to federal courts."³⁴⁷ Here again we see more federalization. The added cases will be highly judge-intensive, although they have a genuine claim on the national jurisdiction. As for horizontal federalism, the ALI Project finessed the possibility of state-to-state transfers by urging that the states consider adopting an Interstate Complex Litigation Compact or enact-

342. 28 U.S.C. § 1407 (1968).

343. *Id.* at 848-51.

344. *Id.* at 851-60; P. John Kozyris, *The Conflicts Provisions of the ALI's Complex Litigation Project: A Glass Half Full?*, 54 LA. L. REV. 953 (1994).

345. Symeonides, *supra* note 336, at 860.

346. See, e.g., Gene R. Shreve, *Reform Aspirations of the Complex Litigation Project*, 54 LA. L. REV. 1139, 1152-53 (1994) (discussing need for reform and predicting Congress will propose reform in this area soon).

347. Herbert P. Wilkins, *The ALI's Complex Litigation Project: A State Judge's View*, 54 LA. L. REV. 1155, 1157 (1994).

ing the Uniform Transfer of Litigation Act.³⁴⁸ As for vertical federalism, there is a dissenting opinion. Even though the American Bar Association,³⁴⁹ the Federal Courts Study Committee,³⁵⁰ and leading academics support the overall ALI approach to consolidate proceedings on the federal side, there are cogent constitutional and practical advantages to consolidate proceedings on the state side.³⁵¹ Ideally, state court consolidation should be afforded equal time in the debate.³⁵² But we should not expect Congress to listen.³⁵³ The most likely prediction, therefore, is that future federal legislation will authorize transfer and consolidation of complex litigation in federal courts. We can only hope that this inevitable legislation, which would create federal jurisdiction over disasters, is not a disaster itself.

3. Habeas Corpus

By federal statute, a person convicted of a state crime and held in state custody can attack the state conviction collaterally in federal court in what is technically a civil suit by alleging that the state's custody is in violation of the Constitution of the United States.³⁵⁴ A federal judge has jurisdiction to order the release of the state prisoner on this ground. It is an understatement to observe, "[t]he power of a single federal judge to overturn a decision affirmed by an entire state court system is troubling to many."³⁵⁵ For the most part, actual guilt or innocence does not enter into it.³⁵⁶

348. *Id.* at 1159. For a discussion on the two alternatives for state to state transfer that the ALI Project suggested, see Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994); John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411 (1988).

349. Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989).

350. FEDERAL COURTS STUDY COMM., *supra* note 36, at 44-45.

351. Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum Over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215 (1994).

352. *Id.* at 274. See George T. Conway, III, Note, *The Consolidation of Multistate Litigation in State Courts*, 96 YALE L.J. 1099, 1100 (1987) (arguing that the Judicial Panel on Multidistrict Litigation, which is charged with the task of consolidating federal claims, should also be given authority to consolidate state proceedings).

353. See H.R. 3406, 101st Cong., 2d Sess. (1990) (proposing consolidation of federal proceedings).

354. 28 U.S.C. § 2241(c)(3) (1988).

355. CHEMERINSKY, *supra* note 306, at 781.

356. See *Herrera v. Collins*, 113 S. Ct. 853, 853 (1993) (holding that claim of actual

Federal habeas corpus in the past has been a dramatic and controversial aspect of judicial federalism.³⁵⁷ The federal jurisdiction "raise[s] basic questions about federalism, separation of powers, the purposes of the criminal justice system, and the nature of litigation."³⁵⁸ Recent Supreme Court decisions have displayed a narrowing attitude toward statutory jurisdiction and procedures. For example, an unsuccessful petitioner may not bring a subsequent petition unless there is demonstrated both "good cause" for not having raised the issue earlier and "prejudice" from not having decided the issue or actual innocence.³⁵⁹ Also, in an important decision, the Court held that habeas petitioners may only assert rights that existed and were articulated by the courts as of the time of their convictions.³⁶⁰ The Supreme Court itself now emphasizes the potential for friction between state and federal courts, the societal costs in terms of judicial finality, and the importance of efficiency in the criminal justice system.³⁶¹

From the federal court side, the concern with caseload often is expressed, particularly since the constitutionalization of criminal procedure virtually guarantees that multiple federal issues can be raised in every state prosecution. Commentators have noted the "needle in the haystack" problem in that very few of the petitions are granted.³⁶² A recent study completed by the National Center for State Courts sheds light on some longstanding issues concerning the jurisdiction.³⁶³ The results of this thorough study of feder-

innocence based on newly discovered evidence is not ground for federal habeas relief); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Jill Hanson Reinmuth, *When Actual Innocence Is Irrelevant: Federal Habeas Relief for State Prisoners After Herrera v. Collins*, 69 WASH. L. REV. 279 (1994); Jordan Streiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303 (1993).

357. See generally Evan Tsen Lee, *The Theories of Federal Habeas Corpus*, 72 WASH. U. L.Q. 151 (1994) (discussing and analyzing various theories that have been proposed in the federal habeas corpus arena).

358. CHEMERINSKY, *supra* note 306, at 781.

359. *Wainwright v. Sykes*, 433 U.S. 72, 86 (1977).

360. *Teague v. Lane*, 489 U.S. 288, 288 (1989).

361. *Id.* at 309-10.

362. "Comprehensive statistics are lacking, but those that are available indicate that the writ is granted in at most 4% of the cases in which it is sought, and in many of these cases it is possible for the state to retry the petitioner." WRIGHT, *supra* note 99, at 366.

363. NATIONAL CTR. FOR STATE COURTS, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* (1994); see also Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637 (1990-1991) (analyzing the results of a similar study, also funded by the State Justice Institute, covering cases filed in the Southern District of New York, and focussing on issues relat-

al and state petitions from four states (Alabama, California, New York and Texas) during the period from 1990 to 1992 disclose that federal courts rarely grant relief. Out of 1626 federal petitions filed in the surveyed states, only 17—or about 1 out of 100—were granted.³⁶⁴ The claims presented to federal courts are similar to those raised in state courts,³⁶⁵ and the claim most often raised is ineffective assistance of counsel.³⁶⁶ A relatively small and declining percentage of prisoners file petitions, but some file multiple times.³⁶⁷ The typical petitioner is serving a lengthy sentence for a serious offense.³⁶⁸ Although petitions do not usually demand a great deal of judge-time, they place significant time demands on law clerks and staff attorneys.³⁶⁹ The study supports the traditional criticism that federal review of state convictions is a duplication of effort.³⁷⁰ Finally, the study validated consensus opinion that reform is needed, but concluded that meaningful reform of federal habeas corpus jurisdiction will not likely be politically possible until death penalty issues are unpacked from the debate.³⁷¹

Recent proposals for reform of the death penalty procedures provide a view on the future of federal habeas corpus jurisdiction.³⁷² In 1989, the Ad Hoc Committee on Federal Habeas Cor-

ing to the debate over federal courts' habeas corpus jurisdiction).

364. NATIONAL CTR. FOR STATE COURTS, *supra* note 363, at 61.

365. *See id.* at 58 (presenting table showing, by percentages, the types of claims raised in state and federal courts in the four surveyed states).

366. *Id.* at 45. *See generally* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990) (surveying the law of ineffective assistance of counsel and arguing for a reform that would allow review of defaulted claims only where there is a reasonable possibility of overturning an unjust conviction).

367. NATIONAL CTR. FOR STATE COURTS, *supra* note 363, at 92.

368. *Id.* at 35-38 (pointing to studies showing that most habeas prisoners were convicted of a serious offense after a jury trial and were consequently serving long sentences, ranging from 24 to 30 years in state courts and 16 to 24 years in federal courts).

369. *See id.* at 20-22 (noting that significant staff time is spent identifying constitutional violations and determining whether counsel should be appointed, due in part to the fact that most petitions are handwritten and filed without assistance of counsel).

370. *Id.* at 91.

371. *See id.* at 89-93 (stating that the issue of habeas corpus reform has been shaped by attitudes toward the death penalty, and arguing that habeas reform in capital cases needs to be separated from reform in noncapital cases).

372. Compare Evan Caminker & Erwin Chemerinsky, *The Lawless Execution of Robert Alton Harris*, 102 YALE L.J. 225 (1992) (arguing that a person should never be executed when a potentially meritorious and previously undecided argument is presented) with Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 YALE L.J. 255 (1992) (arguing that values of federalism and the nature of the federal judicial hierarchy, as well as the timeliness of a prisoner's petition, are important

pus in Capital Cases, appointed by Chief Justice Rehnquist and chaired by former Justice Powell, issued a report concluding that the "present system of multi-layered state and federal appeal and collateral review has led to piecemeal and repetitious litigation, and years of delay between sentencing and judicial resolution as to whether the sentence was permissible by law."³⁷³ The Ad Hoc Committee recommended a six-month period for filing federal petitions which would begin to run when counsel is appointed to represent the prisoner.³⁷⁴ The same year, the American Bar Association Task Force on Death Penalty Habeas Corpus issued an independent report reaching many similar conclusions but emphasizing the importance of appointing counsel in habeas proceedings.³⁷⁵ The A.B.A. report recommended a one-year statute of limitations for habeas petitions, beginning at the conclusion of the prisoner's direct appeals and tolled until counsel is appointed.³⁷⁶

As one might expect, the various committee recommendations were incorporated in bills introduced in Congress.³⁷⁷ Although the bills have been redrafted various times, no legislation has emerged.³⁷⁸ It is unclear whether reforms will be limited to death penalty cases or whether the momentum toward reform will carry farther.³⁷⁹ There seems to be a vague residual feeling among congressional leaders that some legislation is needed, but the sense of urgency that once existed no longer seems to be much in evidence. Perhaps, this finally is recognition on the part of those who were advocating greater statutory restrictions that they have been running

considerations in deciding whether to stay an execution).

373. REPORT TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES 1, 1 (1989).

374. *Id.*

375. A.B.A. CRIM. JUSTICE SECTION REP. TO THE HOUSE OF DELEGATES (1989).

376. *Id.*

377. See CHEMERINSKY, *supra* note 306, at 795-96 (summarizing the provisions of recent bills introduced in Congress).

378. *Id.*

379. "Whatever a person may think of the death penalty, few dispute that the conduct of postconviction proceedings in capital cases demeans almost everyone—the lawyers, the judges, the defendants, the media, and the politicians and others who act as cheerleaders at the spectacle." James E. Coleman, Jr., *Litigating at the Speed of Light: Postconviction Proceedings Under a Death Warrant*, 16 LITIG., Summer 1990, at 14; cf. Robert P. Davidow, *Federal Habeas Corpus: The Effect of Holding State Capital Collateral Proceedings Before a Judge Running for Re-Election*, 8 N.D. J. L. ETHICS & PUB. POL'Y 317 (1994) (arguing for a full fact-finding hearing by a federal court in all death penalty cases in which a state court's fact-finding hearing is conducted by a judge running for re-election).

for a train they already have caught: recent Supreme Court interpretations narrowing the scope of existing statutes may have already accomplished what advocates of greater statutory restrictions wanted.³⁸⁰

The next round of bills might be sponsored by those who would like to maintain or even restore lost jurisdiction in the face of judicial erosion of habeas jurisdiction. However, their chances of success do not seem very good. There will be more bills and further debate, but legislation is not likely any time soon. The Violent Crime Control and Law Enforcement Act of 1994—legislation six years in the making that contains something for everyone—is also silent about federal habeas corpus.³⁸¹ The votes in support of habeas corpus jurisdiction simply do not appear to be there to do anything.³⁸²

4. The End of the Rule of Concurrent Jurisdiction

The general rule of concurrent jurisdiction is that when there are two parallel civil suits between private parties, one in state court and one in federal court, the suits should proceed independently until one or the other is reduced to a judgment and then the first judgment is argued to be *res judicata* or claim preclusive in the second court. Preclusion doctrine “take[s] on an added dimension because of the special problems that come from having two systems of courts, state and federal.”³⁸³ The doctrine generally seems to have lagged behind the rest of federal procedure in terms of sophistication and modernization. Lately, however, commentators and courts have shown a renewed interest in the doctrine generally and in its application across the divide of judicial federalism partic-

380. See generally Joseph L. Hoffmann, *Starting from Scratch: Rethinking Federal Habeas Review of Death Penalty Cases*, 20 FLA. ST. U. L. REV. 133 (1992) (arguing for a complete rethinking of the role of federal habeas in light of the Supreme Court's gradual scaling back of habeas relief); J. Thomas Sullivan, “Reforming” *Federal Habeas Corpus: The Cost to Federalism; The Burden for Defense Counsel; and the Loss of Innocence*, 61 UMKC L. REV. 291 (1992) (discussing the Supreme Court's more restrictive view of the role of habeas corpus and arguing that this view threatens the vitality of the criminal justice system).

381. JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF THE CONFERENCE, H.R. REP. 103-711, 103d Cong., 2d Sess. (1994).

382. H.R. 4092, 103d Cong., 2d Sess. (1994) (showing that too few votes for habeas corpus prevented it from becoming part of the bill). However, the November 1994 election resulted in a sea-change in Congress which renders past predictions rather obsolete and which renders new predictions more or less uninformed, if not more uncertain.

383. WRIGHT, *supra* note 99, at 730.

ularly. Partly the result of pressures from crowded dockets, a hardened attitude has developed towards concurrent jurisdiction. Some believe that litigants should be afforded only "one day" in court and not have two chances to litigation.³⁸⁴ Allowing the same litigant a second chance to litigate the same issue is inefficient and wasteful of scarce judicial resources.³⁸⁵ We can fully expect that "[t]he artificiality and dysfunctional nature of that bifurcated arrangement will become increasingly obvious."³⁸⁶

If we were starting at the beginning of our court system in 1791, we could debate the advisability of having two sets of trial courts, federal and state. Even today this seems like a strange arrangement.³⁸⁷ Other western democracies with federal systems function quite well based on an entirely different judicial arrangement: the state/provincial courts perform the trial function and the federal/national courts perform the appellate function.³⁸⁸ We can dimly perceive this approach in some of our own jurisdictions. Early on, it was settled that the Supreme Court of the United States has jurisdiction to review decisions of even the highest court of a state on federal questions based on the importance of uniformity and supremacy.³⁸⁹ On the other hand, state court determinations of issues of state constitutional law are fully final and not subject to federal court review.³⁹⁰ As a general proposition, lower federal courts may not act as appellate courts for state decisions.³⁹¹ But one cannot understand the federal habeas corpus jurisdiction³⁹² for state prisoners as anything but the notion that lower federal courts are acting as the surrogate of the Supreme Court to review federal constitutional decisions of the state courts. Despite our long history of duplicating the trial function in both

384. *Id.*

385. *Id.*

386. Daniel J. Meador, *Concluding Remarks: National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1895, 1901 (1992).

387. See generally Carl Baar, *Inter-Court Relations in Comparative Perspective: Toward an Ecology of Trial Courts*, 12 JUST. SYS. J. 19 (1987) (discussing the trend toward trial court unification); Meador, *supra* note 386, at 1901 (criticizing the dual system as "dysfunctional").

388. WRIGHT, *supra* note 99, at 720-21.

389. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 315 (1816).

390. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

391. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); see also *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (holding that the district court's jurisdiction is only original).

392. 28 U.S.C. § 2254 (1988).

state and federal courts, it is at least possible, and certainly provocative, to imagine a bifurcated system with trials provided in one judicial system and appeals taken in the other.

How would this work? We cannot suppose that the federal courts would perform the trial function and the state courts would perform the appellate function. This would be contrary to the experience in other countries we desire to emulate. Also, the whole of U.S. judicial history is just the opposite.³⁹³ Contemporary reality ought to bound even musings about the future. Then, we are left to imagine a future judicial system in which all trials are conducted before state courts and those decisions are appealed before federal courts, not necessarily the Supreme Court. There would be constitutional concerns to overcome, to be sure, but they would not be insurmountable. State judges and federal judges have suggested this arrangement to deal with existing problems such as the judicial federalism frictions felt from habeas corpus for state prisoners³⁹⁴ and the growing gap between caseload demand and federal trial court supply in federal question jurisdiction.³⁹⁵ In theory, this bifurcation of function is possible. Discussing the theory aids present understanding and future planning. But it almost goes without saying that the future is not likely to bring this much rationality to the court system in the United States. There simply is too much history for the future to deliver unification of the trial function.

The unification of state and federal trial courts is not likely. I do predict, however, that in the future the general rule of concurrent jurisdiction will come undone and will be discarded on both the federal and the state side as a buggy-whip era doctrine that has no place in modern judicial federalism. In its place, the courts will create a rule of "jurisdictional preclusion" that states only one of the parallel lawsuits may proceed, not both.³⁹⁶ Frankly, "[i]t is

393. Justice Holmes once declared: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states." OLIVER W. HOLMES, JR., *COLLECTED LEGAL PAPERS* 295-96 (1921).

394. James Duke Cameron, *Federal Review, Finality of State Court Decisions, and Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 1981 B.Y.U. L. REV. 545.

395. See Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal System*, 56 U. CHI. L. REV. 761, 768 (1989) (arguing that reallocation of jurisdiction from federal to state courts is most effective means of dealing with increasing federal caseload).

396. The same net effects could be accomplished by federal legislation. Jack B. Weinstein, *Coordination of State and Federal Judicial Systems*, 57 ST. JOHN'S L. REV. 1,

difficult to imagine a constitutional objection to such a rational cooperative system."³⁹⁷ However, this new concurrent jurisdiction will be accomplished through very different theories on each side, federal and state.

On the federal side, there already are statutory and judicial analogues of the predicted rule. There is a venerable statutory mechanism for removing a case from state court to federal court.³⁹⁸ It only allows a defendant in state court to move to a federal forum when the federal district court has subject matter jurisdiction. The various court-created abstention doctrines describe circumstances and procedures when federal courts decline to exercise their jurisdiction.³⁹⁹ Each of the abstention doctrines has at its core the idea that the federal court is justified in deferring to the state court under appropriate circumstances.⁴⁰⁰ The Supreme Court has endorsed the mechanism of certifying a question of state law to the highest court of the state if authorization exists under state statute or state court rule.⁴⁰¹

All these mechanisms for state jurisdiction are the forerunners of the *Younger* doctrine.⁴⁰² This judicially created doctrine has

13-15 (1982).

397. *Id.* at 13.

398. 28 U.S.C. §§ 1441-1452 (1988). Another federal statute allows a federal court to stay a suit challenging the constitutionality of state prison conditions to permit exhaustion of administrative remedies. 42 U.S.C. § 1997e (1988).

399. "The various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases. Rather, they reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987). It has been observed that "[*Pennzoil*]'s footnote holds the potential for much greater deference to the state courts under principles of federalism and comity." Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151, 164 (1987).

400. See *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 31 (1959) (authorizing deference in diversity cases where state law directly applies); *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943) (authorizes deference to state administrative and judicial regulation); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (authorizing deference to state court determinations of state law that could render federal questions moot.); cf. *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185, 198 (1959) (finding inappropriate application of abstention doctrine because state law on issue was clear).

401. See *Lehman Brothers v. Schein*, 416 U.S. 386, 390 (1974) (stating certification is available by statute or by federal court discretion in defined circumstances); cf. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-17 (1964) (finding that a party remitted to state court may return to federal court to resolve federal claims).

402. *Younger v. Harris*, 401 U.S. 37, 37 (1971) (holding that federal courts will not enjoin pending state criminal prosecutions without evidence of great and immediate threat to plaintiff's federally protected rights).

three ingredients: federalism, equity, and comity.⁴⁰³ Over many decisions, it has been extended asymptotically to approach the proposition that the existence of a private lawsuit pending in state court obliges a federal court in a parallel lawsuit to abstain.⁴⁰⁴ The Supreme Court itself insists that the doctrine has not yet been extended this far,⁴⁰⁵ but I predict that the doctrine finally will be extended in scope if it already has not been.⁴⁰⁶

On the state side, the doctrine has farther to go. Existing federal statutes authorize removal of cases from state to federal court,⁴⁰⁷ but there is no provision for removing a case from federal to state court. Under the supremacy clause, state courts that otherwise have jurisdiction may not decline to enforce federal laws, as a general proposition.⁴⁰⁸ State courts cannot enjoin proceedings in federal court.⁴⁰⁹ But there is nothing in these traditional rules of judicial federalism that would prohibit a state supreme court from borrowing a page from *U.S. Reports* to develop a state version of the federal abstention doctrine. When a federal question is pending before a state court and there is a parallel federal lawsuit, the state court could defer to the federal court.

When a question of state law is pending before a state court and there is a parallel diversity lawsuit in federal court, however, there is another procedural option: the state court could issue an invitation to the federal court to certify the controlling state law question to the state court.⁴¹⁰ To make this most advantageous

403. *Id.* at 43-45.

404. See *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (finding abstention appropriate because pending state case may have resolved issue on state law grounds); *Moore v. Sims*, 442 U.S. 415, 423-35 (1979) (warranting federal abstention because of pending state child custody proceedings); *Juidice v. Vail*, 430 U.S. 327, 333-39 (1977) (finding district court erred in enjoining civil contempt proceedings pending in state court); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (remanding nuisance action to determine if *Younger* standards warrant federal intervention despite pending state court proceedings).

405. See *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 367-68 (1975) (stating not every state proceeding justifies *Younger* abstention doctrine).

406. Thomas E. Baker, "Our Federalism" in *Pennzoil Co. v. Texaco, Inc. or How the Younger Doctrine Keeps Getting Older Not Better*, 9 REV. LITIG. 303, 337-44 (1990).

407. 28 U.S.C. §§ 1441-1452 (1988).

408. See *Howlett v. Rose*, 496 U.S. 356, 367-75 (1990) (finding that a state law defense cannot be used in a § 1983 action if it violates federal law).

409. *Donovan v. City of Dallas*, 377 U.S. 408, 411-12 (1964) (recognizing that a state court cannot enjoin a party from prosecuting or appealing an in personam action in federal court).

410. See Paul A. LeBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999 (1985) (discussing the jurisprudential underpinnings of the certification process).

and efficient, state statutes and state court rules that presently authorize federal appellate courts to certify questions of state law to state supreme courts might be expanded radically so that a U.S. district court could certify such a question to a state supreme court.⁴¹¹ This would be analogous to the federal court asking the state court for a declaratory judgment on the state law. It would have to be squared with the state law concerning advisory opinions.⁴¹² And the state court should feel duty bound to do its part and answer the question certified.⁴¹³

In both federal question cases and diversity cases, criteria could be developed to inform the discretion of the state court trial judge on state abstention doctrine. Factors might include: (1) which court first acquired jurisdiction; (2) the convenience of the forum for the litigants and witnesses; (3) the desirability of avoiding piecemeal litigation; and (4) the comparative progress in each court toward trial.⁴¹⁴ The inquiry should be factorial and qualitative.⁴¹⁵ The determinative question is which court, state or federal, has the comparative advantage to fully and fairly decide the dispute.⁴¹⁶

411. Ira P. Robbins, *The Uniform Certification of Questions of Law Act: A Proposal for Reform*, 18 J. LEGIS. 127 (1992). Certification can work horizontally between states as well. Corr & Robbins, *supra* note 348, at 431; see also Note, *To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation*, 102 HARV. L. REV. 842, 850 (1989) (finding the NAAG guidelines, which foster informal interstate cooperation, constitutionally sound).

412. See *In re Elliot*, 446 P.2d 347, 357 (Wash. 1968) (finding advisory opinions may be useful when analyzing an issue from federal court); *United Servs. Life Ins. Co. v. Delaney*, 396 S.W.2d 855, 863 (Tex. 1965) (asserting that the Texas State Constitution looks unfavorably upon advisory opinions); *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 739-43 (Fla. 1961) (reviewing Florida statutory law to support Supreme Court's ability to certify state contract law issues).

413. See Richard Alan Chase, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted?*, 66 ST. JOHN'S L. REV. 407, 415-16 (1992) (stating that certification promotes federalism and comity between state and federal courts).

414. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8-16 (1983) (applying four criteria to find a district court abused its discretion in granting a stay order).

415. See N.Y. State Bar Ass'n, *Report of the Committee on Federal Courts—The Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*, 122 F.R.D. 89, 106-07 (1988) (discussing the factors federal courts should consider when deciding between abstention and certification).

416. 1990 REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 14 [hereinafter STUDY COMMITTEE REPORT].

5. Federal Procedural Rules

We currently are experiencing remarkable changes in the ways federal rules of procedure are promulgated. To understand what might happen in the future, we must understand recent events.

Since 1958, the procedures for rulemaking have been relatively stable.⁴¹⁷ The Judicial Conference is charged by Congress with "carry[ing] on a continuous study of the operation and effect of the general rules of practice and procedure."⁴¹⁸ The Judicial Conference accomplishes its task through its Committee on Rules of Practice and Procedure, commonly known as the Standing Committee, and five separate Advisory Committees, one each for the five separate sets of rules: appellate, bankruptcy, civil, criminal, and evidence rules.⁴¹⁹ Members of these committees include federal judges, state supreme court justices, representatives of the Department of Justice, members of the practicing bar, and law professors.⁴²⁰ Each committee has a reporter, typically a law professor, and the Administrative Office of U.S. Courts provides staff support.

Anyone can propose a change in the rules to an Advisory Committee. Any proposed change and related Committee Note is reviewed by the Standing Committee and then released for a period of public comment and hearings. The Advisory Committee reconsiders the proposed change in light of the public comment and then resubmits the proposal to the Standing Committee. The Standing Committee must vote to transmit the proposal to the Judicial Conference, which in turn passes the proposal on to the Supreme Court. The Supreme Court holds the actual power to promulgate a rule change.⁴²¹ An amendment to a rule goes into effect unless the Congress passes legislation rejecting, modifying, or deferring the proposal.⁴²²

This rulemaking process has been subjected to extreme stress in recent years and its future is in doubt. First, the Civil Justice Reform Act of 1990⁴²³ decentralized and destabilized rulemaking by decreeing a radical experiment in local rulemaking. Each district

417. See generally Baker, *supra* note 314.

418. 28 U.S.C. § 331 (1988).

419. Baker, *supra* note 314.

420. By appointment of Chief Justice Rehnquist, the author has served as a member of the Standing Committee since 1990.

421. 28 U.S.C. § 2072 (1988).

422. 28 U.S.C. § 2074 (1988).

423. 28 U.S.C. §§ 471-482 (Supp. IV 1992).

court is required by the 1990 Act to draft and implement a civil justice expense and delay reduction plan that makes innovations in court procedures and alternative dispute resolution techniques.⁴²⁴ As part of this legislative initiative, the districts will report on the results and the plans will be studied and evaluated in reports to Congress. Supporters of the courts have sounded the alarm that the 1990 Act sounds the deathknell for disinterested experts, centralized rulemaking, and uniform national procedures.⁴²⁵

Second, there has been increased politicization of the rulemaking procedures. In 1988, Congress reformed the rulemaking process to guarantee wider participation and fuller public involvement from outside the judicial branch.⁴²⁶ During the consideration of the most recent controversial amendments that went into effect in December 1993, there was an unusual amount of back-and-forth among the committees and between the committees and factions in the profession.⁴²⁷ At the end of the rulemaking process, both houses of Congress held hearings on the proposals. The House passed a bill that would have rescinded those amendments, but the measure stalled in the Senate.⁴²⁸ Subsequently, there was even some discussion in Congress about rescinding the objectionable rules after they went into effect, but nothing came of it.⁴²⁹

424. *Id.* § 471.

425.

The central importance of the Civil Justice Reform Act is this: the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch. Congress has taken procedural rulemaking power away from judges and their expert advisors and delegated it to local lawyers. By the expedient of declaring procedural rules to be substantive law, Congress has by fiat stripped the judicial branch of a power that uniquely bears on the judicial function: the power to prescribe internal rules of procedure for federal courts. By legislative stealth in enacting the Civil Justice Reform Act, Congress is continuing to transform the Advisory Committee on Civil Rules into a quaint, third-branch vestigial organ.

Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992).

426. 28 U.S.C. § 2073 (1988) (sets forth the Judicial Improvements and Access to Justice Act). See Laurens Walker, *A Comprehensive Reform of Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 468-69 (1993) (discussing the greater public input into procedural formulation after the Act).

427. Walker, *supra* note 426, at 457-59 (discussing the process used in adopting the new informal discovery rules).

428. H.R. REP. 2814, 103d Cong., 1st Sess. (1993).

429. See William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 SETON HALL LEGIS. J. 1, 3, 11 (1993) (noting that Congress had the power to modify the rules, but failed to do so).

Federal judicial rulemaking and the federal rules are undergoing a deconstruction and no one—no one on the bench, no one in the practice, no one in the academy, and no one even in the Congress—knows where it will lead. We seem to be in search of a new paradigm, without knowing what we are looking for in a paradigm.⁴³⁰ Consequently, there have been calls for a moratorium on all rulemaking⁴³¹ and more radical suggestions that civil procedure be reconceptualized so that all existing rules be abolished and dispute resolution procedure be entirely rewritten.⁴³² Even the rulemakers themselves seem unsure of their proper role. Many of the most recent amendments included a kind of local option feature, sanctioning the anomaly of national rules of procedure with local variation.⁴³³

In the future, we likely can expect regular forays into rulemaking by Congress. The trend for Congress to engage in specific rulemaking, like the rules changes legislated in the new crime bill,⁴³⁴ is definitely well-established and growing. We might also expect more global initiatives like the Civil Justice Reform Act of 1990, whether Congress is persuaded that the legislation was a success or a failure, however that conclusion is reached.⁴³⁵

430. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 813-15 (1993) (discussing the grant for a new procedural paradigm); Jeffery W. Stemple, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 661 (1993) (discussing trends in procedural reform).

431. Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 855 (1993).

432.

To my knowledge, a brand new conceptualization of what procedure should do and should be has yet to be attempted. . . . Accordingly, I propose that judges, legislators and lawyers of today undertake to abolish all rules of civil, criminal and appellate procedure and the attendant rules of evidence. I suggest in their place a unified system which eliminates the entire concept of responsive pleading as well as its accompanying pervasive discovery and scenario trials followed by totality of the circumstances appeals.

John L. Kane, *Procedural Reform and the Costs of Litigation*, DOCKET, Fall 1990, at 36, 38.

433. STIENSTRA, *supra* note 177, at 767.

434. The Violent Crime Control and Law Enforcement Act of 1994, § 320935 amends FED. R. EVID. 412, and creates three new evidence rules, FED. R. EVID. 413-415, which would make evidence of a defendant's past similar acts admissible in a civil and a criminal case involving sexual assault or child molestation offense. FED. R. CRIM P. 32 is also amended to afford the victim a right of allocution at the defendant's sentencing. *Id.* § 230101.

435. Carl Tobias, *Silver Linings in Federal Civil Justice Reform*, 59 BROOK. L. REV.

On this subject, we must wait on Congress. It will be instructive for the future just how the 1990 Act's experiment plays out. Legislation has passed both the House and Senate that would extend the deadlines for the evaluations and reports on the civil justice expense and delay reduction plans for another year.⁴³⁶ On the one hand, if Congress deems the 1990 Act a legislative success, then Congress could be tempted to assert itself again to override the formal judicial rulemaking procedures. On the other hand, if the 1990 Act is deemed a failure, Congress could be tempted to experiment with some other reform of judicial rulemaking procedures. There certainly is no shortage of seers,⁴³⁷ but Congress' vision is the only one that counts.

6. Personnel

As one barometer of the changes that already have occurred in the federal judicial institution, consider that over the decades of the 1960s and 1970s, characterized by spiked increases in dockets, the number of support personnel increased threefold.⁴³⁸ Both the docket increases and the staffing response continued unabated through the 1980s.⁴³⁹

Judicial personnel likewise have increased dramatically. The Framers contemplated a minimal number of federal judges to staff a few courts of limited jurisdiction. Alexander Hamilton wrote in *Federalist Paper No. 81* of a single federal judge in only "four or five or half a dozen federal districts."⁴⁴⁰ The federal judicial pyramid below the Supreme Court has been broadened unrecognizably since then. Today, there are 179 circuit judges on the thirteen courts of appeals.⁴⁴¹ Federal statutes divide the country and territories into 94 geographical districts, presided over by 649 district

857, 860 (1993) (noting that the benefits from the Act have yet to be fully realized).

436. S. 2407, 103d Cong., 2d Sess. (1994); H.R. 4357, 103d Cong., 2d Sess. (1994).

437. See generally Panel Discussion, *Civil Litigation in the Twenty-First Century*, 59 BROOK. L. REV. 1199 (1993).

438. See David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 CAL. L. REV. 65, 144 (1981) (noting that between 1961 and 1980 the number of individuals employed by the federal judiciary increased from 5158 to 14,551).

439. See Johnathan P. Nase, *The Growth of the Federal Judicial Labor Force: A Budget-Based Perspective*, 70 JUDICATURE 157, 159 (1986) (stating that growth in complex litigation and an increased work load lead to an increase in support staff in the judiciary).

440. THE FEDERALIST NO. 81, at 486 (Alexander Hamilton).

441. ADMINISTRATIVE OFFICE OF U.S. COURTS, UNDERSTANDING THE FEDERAL COURTS 8, 10 (1992).

judges.⁴⁴² Two additional sets of federal judicial officers, who are non-Article III judges, serve at the *nisi prius* level of the Article III judiciary:⁴⁴³ 345 full-time and 124 part-time U.S. Magistrate judges⁴⁴⁴ and 291 bankruptcy judges.⁴⁴⁵ If one were to add the thousands of Article I administrative law judges appended to the federal agencies, the group picture of the federal judiciary would have to be an aerial photograph.

Thus, the recent debate over whether Congress should declare a moratorium on creating federal judgeships and keep the number of federal judges below 1000 profoundly misses the big picture.⁴⁴⁶ Whether or not "1000" has some magical quality, that barrier fell decades ago; Article III judges today are a minority among federal officers with judicial responsibilities.⁴⁴⁷ The Judicial Conference voted in September 1993 to reject the concept of a 1000 judge limit and to reaffirm the judicial branch's commitment to the principle of limited federal courts staffed by an adequate number of judges.⁴⁴⁸ Projections for the future are rather disturbing, particularly at the courts of appeals level; the future could bring a federal judiciary that has more the appearance and the qualities of bureaucracy than court.⁴⁴⁹

442. *Id.* at 10.

443. *Id.* at 10-11.

444. See 28 U.S.C. §§ 631 (1993) (outlining appointment, tenure, character of service, number, and compensation of magistrate judges).

445. *Id.* §§ 151-158 (describing procedures for designation, appointment, salaries, and appeals for bankruptcy judges).

446. See Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 VAND. L. REV. 1021, 1033 n.4 (1994) (pointing out that if magistrate and bankruptcy judges are counted among federal judges, we will have far surpassed the magic number of 1000).

447. See, e.g., Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 187 (1993); Gerald B. Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70 (arguing against expansion of the federal appellate judiciary because quality will decrease). But see Stephen Reinhardt, *A Plea to Save the Federal Courts—Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52 (advocating an increase in the number of federal judges, particularly appellate court judges); Dolores K. Sloviter, *The Judiciary Needs Judicious Growth*, NAT'L L.J., June 28, 1993, at 17.

448. STUDY COMMITTEE REPORT, *supra* note 416, at 16.

449. The Federal Courts Study Committee explained:

In the past three decades the number of appellate judges nationally has almost trebled, ranging now from six in the First Circuit to twenty-eight in the Ninth. The average court of appeals has thirteen judges. If caseload were the sole determinant, and using the Judicial Conference's 255 participations standard, there would be 206 judgeships for the twelve regional circuits, not the present 156. The average court would have seventeen judges, and at least four of the courts would be on the brink of twenty judgeships. Applying the same

But calls for a moratorium on the creation of district and circuit judgeships⁴⁵⁰ simply miss the point. Here again, past congressional behavior is the best predictor of future congressional behavior. Practical political considerations, including thinking of the federal courts as a government program or constituency service, are far more powerful than debates over whether there is some ideal size of the federal judiciary. The only thing that might slow down judgeship creation is a concern over the budget. Creating each federal judgeship carries a one-time investment of more than a half-million dollars and annual costs are in excess of three quarters of a million dollars.⁴⁵¹ But those numbers are more noticeable within the relatively small budget of the federal judiciary. One can imagine that members of Congress see the costs as a sound investment with the benefit of patronage.

The future will bring continued growth in the Article III judiciary, although not as much as we can expect for non-Article III personnel and support staff. Caseload will demand it. Congress will approve it.

standard to conservative caseload projections suggests a need by 1999 for 315 appellate judges, with an average court of twenty-four judges (and forty-nine on the Ninth Circuit). Tribunals of seventeen, much less twenty-four, sitting in panels of three, may resemble a judgeship pool more than a single body providing unified circuit leadership and precedent. Still, larger courts such as these may be workable. Whether tribunals of thirty or forty judges will be workable is more problematic. The question is not simply one of administration but of the effect, both within the circuit and nationally, of so many uncoordinated opinions from so many judges.

Id. at 114.

450. See Newman, *supra* note 395, at 52 (asserting that different Presidents and Congresses may have different philosophical views regarding the role of the judiciary). *Contra* Richard A. Posner, *Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 765-67 (1983) (arguing that an increase in the number of federal district judges would curtail growth of the appellate caseload).

451. See, e.g., GORDON BERMANT ET AL., IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: AN ANALYSIS OF ARGUMENTS AND IMPLICATIONS 36 (Fed. Jud. Ctr. ed., 1993) (citing \$814,000 per annum expense per circuit judge); Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORDHAM L. REV. 253, 258 (1988) (approximating \$630,000 as the dollar figure to establish a circuit judgeship).

7. Structural Fatigue

The problems for the structure of the federal courts are most pronounced at the intermediate level.⁴⁵² At the Supreme Court level, there have been worries about workload from time to time,⁴⁵³ but these have been assuaged by jurisdictional changes,⁴⁵⁴ most recently in 1988, that provide the Justices near complete discretion over the selection of which cases to hear and decide. This seems to be working. In the 1992-1993 Term, 6336 cases were before the Court. Of the 226 cases addressed on the merits, only 119 were decided by a full opinion. The remainder of the cases were denied or dismissed.⁴⁵⁵

But at the two levels below the Supreme Court, there is no discretion. The district courts and the courts of appeals must dispose of each case on their docket. At the district court level, Congress has created more district judgeships and added magistrate-judges and bankruptcy judges in an attempt to keep pace with docket growth. For the most part, these additions have worked well, although the press of cases has caused some jurisdictional and procedural stress.

The most serious structural fatigue centers on the courts is the middle tier.⁴⁵⁶ The last major restructuring of the federal courts was in 1891 when the courts of appeals were created.⁴⁵⁷ Pausing

452. See generally Kenneth W. Starr, *The Courts of Appeals and the Future of the Federal Judiciary*, 1991 WISC. L. REV. 1 (1991) (arguing that new structure of courts of appeals makes it difficult for judges to collaborate on cases and issues); see also Kenneth W. Starr, *The Supreme Court and the Future of the Federal Judiciary*, 32 ARIZ. L. REV. 211, 219 (1990) (discussing structural changes to the judiciary in light of founding principles of our American government).

453. SAMUEL ESTREICHER & JOHN SEXTON, *REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS* (1986); cf. Thomas E. Baker, *Siskel and Ebert at the Supreme Court*, 87 MICH. L. REV. 1472, 1473-74 (1989) (reviewing *REDEFINING THE SUPREME COURT'S ROLE*, *supra*, and giving authors "one thumb up and one thumb down").

454. See Robert L. Stern et al., *Epitaph for Mandatory Jurisdiction*, A.B.A. J., Dec. 1988, at 66 (citing legislation that released the Court from appeals it was technically obliged to hear); John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1 (1983) (urging Congress to remove the remainder of the Court's mandatory jurisdiction).

455. For the October 1993 Term, the total number of cases was 7786 and the Justices wrote only 99 opinions. WRIGHT, *supra* note 99, at 15.

456. See CHEMERINSKY, *supra* note 306, at 22 ("Undoubtedly, the most significant change in the structure of the federal courts over the past 200 years has involved the evolution of the courts of appeals.").

457. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

to consider for just a moment all that has happened in national life and in the legal system over the intervening century obviates any surprise that the nineteenth century design may be showing signs of fatigue. Until the present generation, the organization of the courts of appeals worked rather well. But the last four decades have brought the courts of appeals to a serious "crisis of volume."⁴⁵⁸ Consider these figures for the regional courts of appeals:

In 1950, there were 65 authorized circuit judgeships, 2,830 appeals were filed, and 2,355 appeals were terminated (36 per authorized judgeship). In 1990, there were 156 authorized circuit judgeships; 40,898 appeals were filed; and 39,520 appeals were terminated (246.9 per authorized judgeship).⁴⁵⁹

Over the years, Congress has responded primarily with two extramural reforms: adding judges and dividing circuits. The previous section of this paper describes the future implications of creating new judgeships. As for dividing circuits, as was done to the old Fifth Circuit⁴⁶⁰ and is still being debated for the present Ninth Circuit,⁴⁶¹ it is enough to say that "Congress lately has shown signs of abandoning the technique."⁴⁶² Dividing circuits is not a remedy for the problems of the courts of appeals. Caseload is distributive: if Congress simply splits an overloaded circuit into two new courts of appeals, the same total number of judges on the two new courts must decide the same total number of appeals. Circuit splitting is not likely to be a future reform, unless it is part of some major restructuring.

If the inevitable happens, that more appeals are filed and more judgeships are created, then Congress will face the task of reimagining the intermediate federal tier.⁴⁶³ Congress knows the

458. "However people may view other aspects of the federal judiciary, few deny that its appellate courts are in a 'crisis of volume' that has transformed them from the institutions they were even a generation ago." STUDY COMMITTEE REPORT, *supra* note 416, at 109.

459. Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97, 103 (1994).

460. BAKER, *supra* note 119, at 52-73.

461. *Id.* at 74-105.

462. *Id.* at 228.

463. Professor Meador asserts that "[I]f appeals continue to increase, as seems likely, the creation of still more judgeships will be inevitable. That will cause increasing difficulties in maintaining intra- and intercircuit harmony in federal decisional law. Ultimately, some sort of redesign or restructuring of the appellate system will probably be unavoidable." Professor Daniel J. Meador: *A Perspective on Judicial Improvements*, THIRD

time is approaching when it will be required to redesign the courts of appeals. In December 1993, the Federal Judicial Center (FJC) published a report commissioned by the Congress entitled, "Structural and Other Alternatives for the Federal Courts of Appeals."⁴⁶⁴ The FJC Report reviews many alternatives for the courts of appeals: total or partial consolidation; size reduction; multiple tiers; discretionary appeals; differentiating appellate tracks; district court error review; jurisdiction reduction; and other nonjurisdictional options.⁴⁶⁵

What Congress will do is anyone's guess. However, Congress ought to plan for the future of the courts of appeals by creating a study group to act as legislative architects that will develop and model alternative federal appellate structures with some level of detail and particularity. Then, Congress should hold hearings and exercise sound legislative judgment to choose from the alternatives.⁴⁶⁶ Chief Justice Rehnquist concluded that "[a]lthough no consensus has yet developed around any particular set of changes to the status quo—and to be sure any alternatives will present practical and political difficulties—it is safe to say that change will come."⁴⁶⁷ The inescapable prediction is that he is correct, and the next generation will witness a major congressional reform of the federal intermediate courts.

C. A Postscript

As far as federalization is concerned, the obvious question is whether it will continue or even accelerate. "[F]ederalization is a complex process that engages many players and is driven by political, legal, economic, social, and pragmatic factors."⁴⁶⁸ If the past

BRANCH, Dec. 1992, at 10. For additional articles by Professor Meador, see Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989); Daniel J. Meador, *American Courts in the Bicentennial Decade and Beyond*, 55 MISS. L.J. 1 (1985).

464. JUDITH A. MCKENNA, FEDERAL JUD. CTR. STRUCTURAL AND OTHER ALTERNATIVES FOR THE FED. COURTS OF APPEALS, REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES (1993).

465. *Id.*

466. For a detailed discussion of such a proposal, see Thomas E. Baker, *A Proposal that Congress Create a Commission on Federal Court Structure*, 14 MISS. C. L. REV. 271 (1994).

467. Chief Justice William H. Rehnquist, Welcoming Remarks at the 1993 National Workshop for Judges of the U.S. Courts of Appeals (Feb. 8, 1993) (quoted in BAKER, *supra* note 119, at 302 n.40).

468. SCHWARZER & WHEELER, *supra* note 178, at 40.

congressional behavior is any indicator, the future will bring more federalization of the law.⁴⁶⁹ Thus, we can expect that more people, in more situations, will be able to "make a federal case out of it." Indeed, that very expression has already become dated and has lost its sarcastic edge.

For the sake of fairness and accuracy, the beginning observation that the federal courts are not doing as much as the state courts to prepare for the future does not mean that the federal judiciary is doing nothing.⁴⁷⁰ In 1988, Congress created the Federal Courts Study Committee as an ad hoc committee of the Judicial Conference of the United States.⁴⁷¹ Appointed by Chief Justice Rehnquist, the fifteen-person Committee included representatives of all three federal branches, state government officials, practitioners, and academics.⁴⁷² This blue-ribbon group of court insiders issued a comprehensive final report that evaluated virtually the entire federal court system. The Study Committee offered many initiatives for the future of the federal courts.⁴⁷³ The Judicial Conference of the United States has constituted a standing committee on long-range planning for the judiciary.⁴⁷⁴ Both the Administrative Office of U.S. Courts and the Federal Judicial Center have developed significant levels of support for long-range planning initiatives.⁴⁷⁵ Thus, experimentation at the federal level is centralized and more deliberate.⁴⁷⁶

However, state courts have comparatively greater involvement and more diversity in futures activities. One possible explanation relates to perception and motivation. The siege mentality at the

469. In a recent private letter a federal judge I know wrote, "The 'future' depends 99% on Congress. That is what makes me pessimistic."

470. As Oliver Wendell Holmes said, "[N]o one will understand me to be speaking with disrespect . . . [for] one may criticize even what one reveres." Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897).

471. 28 U.S.C. § 331 (1988).

472. STUDY COMMITTEE REPORT, *supra* note 416, at 31.

473. *Id.* at 35-170.

474. See Baker, *supra* note 4, at 10-15; Otto R. Skopil, Jr., Framework for Long-Range Planning in the Federal Judiciary, Speech Before the Ninth Circuit Judicial Conference (May 1992), in LONG-RANGE PLANNING FOR CIRCUIT COUNCILS 29 (Fed. Jud. Ctr. ed., 1992) (addressing the committees' role and operations).

475. See, e.g., BERMANT ET AL., *supra* note 451; Charles W. Nihan, Strategic Planning: A Process Overview Speech Before the Ninth Circuit Judicial Conference (May 1992), in LONG-RANGE PLANNING FOR CIRCUIT COUNCILS, *supra* note 474, at 35.

476. See, e.g., FEDERAL JUD. CTR., REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981) (discussing standard considerations for evaluating an experimental program).

state level—the sense that workload exceeds judicial resources so much that basic functions are threatened and system breakdown is feared—is relatively more severe and certainly of far longer duration than at the federal level. Despite all the problems facing federal courts, federal judges remarkably, perhaps unrealistically, remain unconcerned and unthreatened.⁴⁷⁷ As a group, federal judges are more content than their state colleagues.

A second possible explanation is systemic. The federal court system, like each individual state court system, is centrally and hierarchically organized. Yet, the two systems have in common the same remarkable variation in federalism. By definition, the federal system encompasses all the variation in legal culture to be found in the fifty states. At the same time, however, the federal system must respond to a problem as an entire entity without the hegemony of state subdivisions. Solutions to problems and reforms must be national. The *Federal Rules of Civil Procedure*, for example, apply equally in the District of Wyoming and in the Southern District of New York. On the state side, differences between Wyoming and New York are built into the court organizations, jurisdictions, and procedures. I submit that the necessary requirement of national uniformity means that federal reforms amount to the lowest common denominator of change and solution.

IV. JUDICIAL FEDERALISM INITIATIVES IN THE FUTURE

Having discussed futurism and having described the separate futures of the state courts and the federal courts, it is incumbent on me to identify trends and ideas that will describe how the two judiciaries will relate to each other in the years ahead. This effort will include what is likely to happen as well as what might happen. I want to talk about the future the courts can expect and the future the judiciaries can shape together. My particular focus will be on the areas I envision for cooperation between state and federal courts.

477. See Michael C. Gizzi, *Perspectives of a Crisis*, 78 JUDICATURE 106, 106 (1994) (discussing the issue of whether there is a crisis).

A. *The Theory of Judicial Federalism*

Before getting to the particulars, it is helpful to understand what we mean by "judicial federalism."⁴⁷⁸ The general principle of federalism is not found in so many words in the text of the Constitution, but nonetheless is an essential part of the deep structure of our government.⁴⁷⁹ Madison described it as our "partly federal and partly national" Constitution.⁴⁸⁰ The need for the adjective "judicial" should be apparent. The relationship between the state and national judicial branches is the only place on the contemporary constitutional scene where federalism is taken seriously.⁴⁸¹ In every other area of national life, the Supreme Court has abdicated its constitutional duty and has deferred to Congress at the expense of state sovereignty. This abdication is evidenced by the Court's Commerce Clause and Tenth Amendment jurisprudence.⁴⁸² "Federalism is dead" everywhere else but between the state and federal judicial branches.⁴⁸³ Judicial federalism thus de-

478. For a detailed discussion on this issue, see Baker, *supra* note 305.

479. See Ralph A. Rossum, *A Means-Ends Approach to the Study of the Constitution and Constitutional Law*, 13 TEACHING POL. SCI. 36, 43-45 (1985).

480. THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

481. See Stanley C. Brubaker, *From Incompetent Imperialism to Principled Prudence: The Role of the Courts in Restoring "The State,"* 10 HASTINGS CONST. L.Q. 82 (1982) (discussing the role of the courts in protecting the constitutional value of federalism but advocating that the political branches should be responsible for this task); Mitchell E. Daniels, Jr. & Alexander Dimitrief, *Taking Federalism Seriously*, 36 DEPAUL L. REV. 463 (1987) (examining the impact of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), on federalism); Stephen L. Fluckiger, *The Changing Relationship of the Judiciary to the Policy and Administrative Processes of Governments: An Overview of Recent Commentary on the Nature, Causes, Consequences, and Proposals for Reform of Contemporary Judicial Encroachment*, 1985 B.Y.U. L. REV. 671 (arguing that judicial encroachment threatens the survival of federalism and separation of powers); Lino A. Graglia, *The Growth of National Judicial Power*, 14 NOVA L. REV. 53 (1989) (arguing that American constitutionalism is the history of the aggrandizement of centralized judicial power).

482. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that Congress can use its spending power under the Commerce Clause to encourage uniformity in the states' drinking age and finding that such an act does not violate the Tenth Amendment); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that wage and hour provisions imposed on state entity did not exceed Congress' power under the Commerce Clause and pointing to the political process as the protector of the states); *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that the regulation of production and consumption of wheat by Congress under the Commerce Clause is permissible even though wheat is local in character and its effect upon interstate commerce is indirect). It should be noted, however, that within a year after *Garcia*, the cities and states convinced Congress to overturn the specific ruling of *Garcia* by getting an exemption from the controlling statute. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787 (codified as amended at 29 U.S.C. §§ 201, 203, 207, 211, 215-216 (1988)).

483. PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 96

fined and narrowed is a fascinating kind of constitutional neurosis.⁴⁸⁴

This condition would not be so interesting or so important if the state and federal judiciaries were each concerned only with its own laws. Each judicial branch, however, confronts questions that arise under the law of the other sovereign routinely and frequently. State courts decide questions of federal law and federal courts decide questions of state law.

Confrontation is inherent in this design of our federalism.⁴⁸⁵ Conflicts are inevitable. The organizations and jurisdictions of the state courts and the national courts intersect at points of inevitable friction. Issues of jurisdiction are issues of power. Issues of power rely on sovereignty and supremacy. The law of federal jurisdiction reflects a basic duality.⁴⁸⁶ One set of federal statutes and one set of Supreme Court decisions glorify the federal courts as the primary protectors of individual rights. A second set of federal statutes and a second set of Supreme Court decisions do the same for the state courts. These two sets of statutes and decisions are no more compatible than their underlying assumptions. This sometimes is called the "parity debate" and it is seemingly unending, although at different times one side or the other has enjoyed the ascendancy in Congress and in the Supreme Court. The assumptions about the relative competency of the state and federal judiciaries are empirically unprovable.⁴⁸⁷ But both sides have in common the norm of federalism.⁴⁸⁸

The philosophical rationale for judicial federalism is explainable as an aspect of the larger intellectual history of federalism.⁴⁸⁹ The

(1970).

484. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906 (1994) ("In fact, federalism is America's neurosis.").

485. A national court system made up of dual systems of state and national courts is "comprehensible only as a blueprint for conflict and confrontation, not for cooperation and deference." Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 684 (1981).

486. See Martha A. Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683, 684 (1981) (describing federal jurisdiction as indicative of "schizophrenia").

487. CHEMERINSKY, *supra* note 306, at 36-37; see also Baker, *supra* note 151, at 827-28 ("I decline to decide which I favor, federal judges or state judges. My problem is that I respect both groups.").

488. See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993) ("In the midst of an ongoing dialogue about the respective powers of the state and national governments, voices on both sides agree that the Constitution preserves federalism. . . .").

489. See Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB.

mode of confrontation and conflict and the debate over parity is best understood as a holdover from what might be labelled "dual federalism." Dual federalism posited that "the federal government and the separate states constituted two mutually exclusive systems of sovereignty, that both were supreme within their respective spheres, and that neither could exercise its authority in such a way to intrude, even incidentally, upon the sphere of sovereignty reserved to the other."⁴⁹⁰ The mode of cooperation and communication characterizing judicial federalism today is fairly attributable to the theory of "cooperative federalism." Cooperative federalism views the "state and federal governments as complementary parts of a single governmental process [and] [t]he two court systems are . . . but one system of justice to protect individual freedom from government excess."⁴⁹¹

Cooperative federalism is the philosophy on the rise in the judicial realm. Justice O'Connor has compared the relationship between the state and federal courts to a marriage that must be based on mutual respect and requires effort on both sides.⁴⁹² Judicial federalism is based on this philosophy of cooperative federalism, not on any political ideology or legal philosophy. Judicial federalism knows no liberals or conservatives, only judges trying to be true to their judicial oath. Chief Justice Rehnquist describes our Hamiltonian system of state and federal courts as an "arrangement[] contemplat[ing] a large measure of intersystem cross-fertil-

POL'Y 1 (1982) (discussing traditional values or virtues of federalism such as history, local autonomy, individual liberty, reducing excessive government spending, and efficiency); Lino A. Graglia, *From Federal Union to National Monolith: Mileposts in the Demise of American Federalism*, 16 HARV. J.L. & PUB. POL'Y 129 (1993) (detailing the major constitutional cases which have led to the demise of federalism); Ed Herschler, *Federalism: A State Perspective*, 4 DET. C.L. REV. 1131 (1986) ("Two centuries ago, the framers worked to produce a constitution fashioning a federal system of government . . . [But] we have lost the 'federalism' concept. . . ."); Maurice J. Holland, *Prospects for Federalism*, 6 HARV. J.L. & PUB. POL'Y 31 (1982) (discussing the historical decline of federalism and predicting and uncertain future for federalism).

490. Baker, *supra* note 151, at 824 (citations omitted).

491. *Id.* at 826 (citations omitted). See also John B. Oakley, *The Future Relationship of California's State and Federal Courts: An Essay on Jurisdictional Reform, the Transformation of Property, and the New Age of Information*, 66 S. CAL. L. REV. 2233, 2246-49 (1993) (recommending short-term coordination and long-term integration of state and federal courts).

492. "Our judicial federalism can and will work. But the marriage between our state and federal courts, like any other marriage, requires each partner to respect the other, to make a special effort to get along together, and to recognize the proper sphere of the other partner." Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1 (1985).

ization and collaboration."⁴⁹³ Justice Brennan insists, "[t]he time has come . . . to recognize fully that, while our functions are different and while our decisions must sometimes disagree, we are nevertheless all engaged in administering the law of the same nation."⁴⁹⁴ Federalism still is important to judges and to courts as a principle of how they get along.⁴⁹⁵

B. Judge-to-Judge Initiatives

At the 1992 National Conference on State-Federal Judicial Relationships, Chief Justice Ellen Peters of Connecticut gave a report from the trenches that is a good general "list of things to do" for state and federal judges one-on-one.⁴⁹⁶ I cannot improve on her list. We cannot expect that the problems and the solutions will change in the coming years. Legislators hold hearings. Bar associations appoint committees. Scholars conduct studies. But judges must decide cases and the press of caseload has turned many judges into innovators.⁴⁹⁷ Therefore, on the local level, we

493. Calling for "a renewed focus on the original Hamiltonian notion of the collaborative relationship between state and federal courts," Chief Justice Rehnquist went on, "Hamilton wrote that 'the national and state systems are to be regarded as ONE WHOLE.' And, to this day, a significant portion of federal and state jurisdiction is concurrent. . . . These arrangements contemplate a large measure of intersystem cross-fertilization and collaboration." Rehnquist, *supra* note 10, at 1.

494. In a speech before the Supreme Court of Puerto Rico, Justice Brennan endorsed judicial federalism:

It seems to me that notions of conflict and of fundamental difference of aims between state courts and the federal courts have been grossly and unfortunately exaggerated. The time has come, I think, to recognize fully that, while our functions are different and while our decisions must sometimes disagree, we are nevertheless all engaged in administering the law of the same nation. Our common denominator is that we both work under the pressure of an increasing, inexorable demand for decision of cases churned up out of real life by the legal system, and involving deeply felt necessities of real life litigants. There is no justification for the view that we are headed in opposite directions, and that the only legal bond between us is the subjugating one of the Supremacy Clause.

William J. Brennan, Jr., *Some Judicial Aspects of Federalism*, REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 1 (1983).

495. See generally Judith A. McMorrow, *Judicial Federalism and Direct Interaction Between State and Federal Courts*, 72 MASS. L. REV. 21 (1987).

496. Ellen Peters, *State-Federal Judicial Relationships: A Report from the Trenches*, 78 VA. L. REV. 1887, 1892 (1992).

497. Judges are practical managers, out of necessity:

Federal caseload has been the subject of congressional investigation, bar association study, and scholarly symposia. For the most part, discussions about caseload have proceeded from the assumption that, since they neither file cases nor

ought to expect future coordination to develop along the following lines suggested by Judge Peters:

Routine collaboration in trial administration: Regular consultation to achieve "coordination of court calendars, juror lists, expert witness lists, and attorney discipline proceedings."⁴⁹⁸ To be most successful and useful these ought to be made routine, but there is some benefit to be gained even from only a case-specific approach.

Sharing space and facilities: "Cooperative access to courtrooms and other court facilities to ease temporary space shortages in either court system."⁴⁹⁹ Unfortunately, we have experienced an unusual number of national disasters, floods, earthquakes, fires, and hurricanes. Cooperation is at a premium during such crises, but space and facilities problems short of a catastrophe also claim the help of the two court systems.

Assuring the systematic exchange of information: Routine "exchange of information would help to identify related cases pending in the two court systems so that the courts could explore joint discovery procedures, joint motions practice, and joint settlement initiatives."⁵⁰⁰

Greater reliance on an improved certification procedure: "The federal certification of issues of state law to state courts would be enhanced by agreement about procedures for the appropriate definition of novel questions of law by the federal courts and for their speedy resolution by the

control jurisdiction, judges are faced with the unhappy choice between increasing backlogs or less carefully considered decisions. Judges, however, have not viewed their options so narrowly. Instead, some judges have endorsed and implemented procedural innovations they believe will speed cases up or terminate them without trials. Most judges, in addition, have implemented rationing: they save their time for the cases they believe require the most, delegating as much as possible of the work they view as routine to non-Article III adjuncts.

Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 B.Y.U. L. REV. 3.

498. Peters, *supra* note 496, at 1892.

499. *Id.*

500. *Id.*

state courts.”⁵⁰¹

Joint educational programs: Joint state-federal judicial educational programs “would stretch educational resources and facilitate the exchange of new ideas.”⁵⁰²

I want to emphasize the first of these, state and federal judge cooperation and collaboration in trial administration. At the 1992 National Conference, Judge Schwarzer and his FJC colleagues told stories about the way individual trial judges were coordinating litigation in the state and federal courts.⁵⁰³ At the present Conference, we heard more about administrative and litigation coordination from the panel moderated by Judge Fitzpatrick.⁵⁰⁴ George B. Cauthen described the intricacies of bankruptcy procedure that necessitate coordination.⁵⁰⁵ Deborah M. Russell described the interplay of Federal Rule of Civil Procedure 23, class actions, and the provisions for multi-district litigation that are on the books and what creative lawyers and judges are doing with them.⁵⁰⁶ Judge Starcher described the West Virginia practical experiments with coordinating discovery.⁵⁰⁷

As we heard, there is a premium placed on this kind of coordination in bankruptcy and mass tort litigation. But those insights and techniques can and will be generalized across the docket in the future. Likewise, we heard the panel moderated by Plato Chacheris describe some of the problems in search of solutions on the criminal side.⁵⁰⁸

Most of the work in the court system gets done at the trial level. Most of the judicial federalism can be expected to take place there.⁵⁰⁹ State trial judges and federal trial judges have a great

501. *Id.*

502. *Id.*

503. William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

504. Middle Atlantic State-Federal Judicial Relationships Conference, Administrative and Litigation Coordination Between the State and Federal Courts (Judge Johanna L. Fitzpatrick, moderator).

505. George B. Cauthen, *Bankruptcy and State/Federal Judicial Relations* (1994) (text available from author).

506. Deborah M. Russell, *Management of Mass Tort Litigation: Class Actions and Multi-District Litigation* (1994) (text available from author).

507. Larry V. Starcher, *Discovery Issues/Coordination* (1994) (text available from author).

508. Middle Atlantic State-Federal Judicial Relationships Conference, *Criminal Case Processing in the Middle Atlantic States* (Plato Chacheris, moderator).

509. Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO

deal in common. They live and work in the same community. They come from the same bar, as do the attorneys that appear in their courts. They belong to the same local organizations. It is not uncommon that a federal judge once sat on the state bench. They know each other and each other's problems. They ought to be disposed to help each other. There are differences, of course, in what they do and how they do it, but the similarities ought to be emphasized. They need each other's help. And they need each other's help most with what they do most: preparing and trying cases.

Judge Schwarzer's account brings together stories from past isolated coordinations that, in the future, will become the norm in such cases. In appropriate situations, we can expect state and federal courts to coordinate discovery and pretrial proceedings related to discovery and settlement, to hold joint hearings and even joint trials. State and federal intersystem coordination will be more in evidence in the future because it has "proven effective" at "promot[ing] economy, efficiency, and consistency."⁵¹⁰ In the future, we can expect innovative coordinations using courts' computers. Judges might establish procedures for sharing law clerks and staff attorneys, in effect detailing them to perform all the support work in a case for both courts.

There was a time when I advocated an amendment to the relevant federal and state rules of civil procedure to authorize intersystem cooperation.⁵¹¹ Now I am not so sure this is needed or even a good idea. When it comes to rules of procedure, judges tend to be either strict constructionists or loose constructionists. The former will not do anything not explicitly authorized in the rules; the latter will do anything not explicitly prohibited in the rules. A general rule approving intersystem cooperation will not provide a loose constructionist with any more incentive to experiment; a detailed rule might retard strict constructionists. These intersystem initiatives have more of the quality of a local rule or a standing order, than a national or statewide rule.

In the future, I predict more trial judges and courts will undertake more intersystem coordination without any formal rule changes, encouraged by better communication possibilities. The National

ST. L.J. 399, 401 (1989).

510. Schwarzer et al., *supra* note 503, at 1732.

511. *Id.* at 1750.

Center for State Courts already is compiling a manual of the most effective procedures that state and federal courts have developed to cooperate with each other.⁵¹² Greater involvement in cooperative ventures will lead to new methods, as the practice becomes more accepted and more widespread. Certainly, what I have heard at this Conference seconds the notion that this will be a fruitful area for judicial federalism in the coming years. It is critical that these judge-to-judge initiatives be studied, evaluated and reported, so that other judges can use and adapt techniques.⁵¹³

C. Court-to-Court Initiatives

Moving up from judge-to-judge initiatives, there is future possibility for court-to-court coordination at the appellate level in the area of federal habeas corpus in state death penalty cases. Recall that earlier I predicted Congress will not enact any reform for this pressure point in judicial federalism. Nonetheless, there is some possibility for judicial reform of the applicable procedures. I base this suggestion on the current controversy in the Ninth Circuit. Back in February 1994, prompted by the controversy and procedural complications in the execution of Robert Alton Harris,⁵¹⁴ the Ninth Circuit promulgated a new Local Rule 22 for the circuit for federal habeas appeals in state death penalty cases.⁵¹⁵ Briefly summarized, the new local rule: divides habeas corpus litigation into first petition and subsequent petition components;⁵¹⁶ directs that the same three-judge panel handle all litigation in a particular capital case;⁵¹⁷ applies to related non-habeas litigation;⁵¹⁸ institutionalizes single-judge stays of execution;⁵¹⁹ and creates multiple levels of en banc review which may be conducted without a majority vote of the judges.⁵²⁰

The point needs to be explicitly made that I am NOT approving or endorsing the contents of the Ninth Circuit Rule. That would be

512. Announcement, *Manual to Share Ideas*, COURT ADMIN. BULLETIN, Sept. 1994, at 1 (contact Tom Munsterman, National Center for State Courts, 1700 N. Moore Street, Suite 1710, Arlington, VA 22209).

513. Geoff Gallas, *Judicial Leadership Excellence: A Research Prospectus*, 12 JUST. SYS. J. 39 (1987).

514. *Vasquez v. Harris*, 112 S. Ct. 1713 (1992).

515. 9TH CIR. R. 22.

516. 9TH CIR. R. 22-3, 22-4.

517. 9TH CIR. R. 22-2(a)(3).

518. *Id.*

519. 9TH CIR. R. 22-4(d)(5).

520. 9TH CIR. R. 22-4(e).

inappropriate for me to do. Attorneys General from Arizona, California, Nevada, and Oregon have asked the Judicial Conference of the United States to exercise its statutory power to abrogate the Rule, and the matter currently is pending before the Standing Committee on Rules of which I am a member.⁵²¹

What I am endorsing is the future possibility of using local rules of the circuits to deal with regional problems that are of a recurring nature. It is important to remember that the regional U.S. courts of appeals are "separate and designedly distinct institutions."⁵²² Each has "a unique social and judicial culture."⁵²³ The most logical unit of federal government to deal with some issues of judicial federalism is the circuit. Such appellate court-to-court cooperation could be accomplished regionally between the state supreme courts and the courts of appeals. Again, without commenting on the merits of the Ninth Circuit's new Rule 22, federal habeas in state death cases is an important and recurring concern for state and federal courts that might be dealt with in the future by court rules.⁵²⁴

Another possibility for innovative local rules might be to establish formal written procedures on the federal side for the certification of questions of state law to the state courts.⁵²⁵ These could and should be coordinated with the state supreme courts, in a cooperative effort to draft the most efficient and useful federal court procedures. Establishing new uniform certification procedures on the federal court side should be accompanied by a reevaluation of existing state statutes and rules for certification as well.⁵²⁶ I have always thought of the certification device as a missed opportunity for judicial federalism for the simple reason that not enough

521. Brief of the State Attorneys General of Ariz., Cal., Nev., and Or. (Sept. 14, 1994) (available from author).

522. BAKER, *supra* note 119, at 107.

523. *Id.*

524. See Marchus M. Kaufman, *Crisis in the Courts*, CAL. LAW., Aug. 1990, at 28, 32 (discussing the inability of California courts to enforce the death penalty); Victoria Slind-Flor, *9th Circuit's Theme: Federalism*, NAT'L L.J., Aug. 30, 1993, at 3, 32 (discussing tensions between state and federal courts in federal habeas corpus cases).

525. See Jack J. Rose, Note, *Erie R.R. and State Power to Control State Law: Switching Tracks to New Certification of Questions of Law Procedures*, 18 HOFSTRA L. REV. 421, 450-51 (1989) (proposing federal rule of appellate procedure which would facilitate certification procedures).

526. See *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 493 n.21 (1983) (explaining that state authorized certification procedures simplify submission of questions of state statutory interpretation to state supreme courts).

questions are certified. Regularizing the procedures from the federal side would encourage greater usage, as would expansion of the procedure from the state side to authorize the federal district courts to certify questions. While only about half of the states currently allow for federal district court certifications, this represents a great potential gain for judicial federalism.

Certification might be made reciprocal on the federal side. Given the phenomenon of "federalization," state courts will be deciding more and more questions of federal law. We ought to consider authorizing state courts to certify questions of federal law to the federal courts of appeals. This would have to be accomplished with a new federal jurisdictional statute. In one sense this makes more sense at the courts of appeals level than at the Supreme Court level. The courts of appeals have become regional "mini-supreme courts" for many issues of federal law on which there is a "conflict among the circuits." These conflicts persist and accumulate with the consequence that the controlling law of the circuit is different from region to region.⁵²⁷

In fact, the mechanism of "[c]ertification has a long history in federal practice."⁵²⁸ It has existed since the beginning of the federal courts down to the present statute that authorizes courts of appeals to certify questions of federal law to the Supreme Court.⁵²⁹ This certification procedure has been used only three times in the last thirty years⁵³⁰ and has been described as "an anachronism that the courts of appeals should not use."⁵³¹ Certifying questions of federal law within the federal court system compromises two important Supreme Court policies: the avoidance of unnecessary decisions of abstract questions of law and the discretion of the Court over its docket. Neither of these problems would apply to questions of federal law certified by state supreme courts to the federal courts of appeals.

Two federal procedures already on the books are somewhat similar to the statute being proposed, although they relate to certifications within the federal system. A district court can certify a

527. See BAKER, *supra* note 119, at 17-21 (explaining that increasing numbers of appeals prohibit the Supreme Court from reviewing appellate interpretations of federal law resulting in regional discrepancies).

528. WRIGHT, *supra* note 99, at 777.

529. 28 U.S.C. § 1254(2) (1988).

530. WRIGHT, *supra* note 99, at 778 n.33.

531. *Id.* at 778.

partial final judgment to the court of appeals under Federal Rule of Civil Procedure 54(b) if more than one claim is presented or multiple parties are involved and the matter in question is separable and has been finally decided.⁵³² Even more analogous is the little-used permissive interlocutory appeal authorized in 28 U.S.C. § 1292(b).⁵³³ Upon entering an order that is not otherwise appealable and that decides a controlling issue of law about which there is substantial uncertainty, a district court may certify the question and the court of appeals may decide it.⁵³⁴

D. Judiciary-to-Judiciary Initiatives

Moving up from court-to-court, the next group of future initiatives will take place at the judiciary-to-judiciary level of judicial federalism. These activities take place between representative bodies such as the Conference of Chief Justices, the Judicial Conference of the United States, the National State-Federal Judicial Council, and State-Federal Judicial Councils in the states. However, these initiatives are not confined within the judicial branches. Rather, many of the most important future activities in this category will be joint ventures of the state and federal judicial branches aimed at those outside the courts. The challenges of the future will place a high premium on efforts by the judicial branches to make their case to the legislative branch, the bar, the academy, and the public. At this level, the job description of judges "change[s] from being an arbiter *within* the courts to being an arbiter *for* the courts."⁵³⁵

The essential attitude for judiciary-to-judiciary initiatives is cooperation. Only through cooperation can the state and federal judiciaries maximize their chances to influence those outside the courts. Unilateral or self-interested behavior surely will worsen the overall situation of the courts.⁵³⁶ The state and federal judiciaries

532. FED. R. CIV. P. 54(b); THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS § 3.05 (1989).

533. See BAKER, *supra* note 532, § 4.03 (explaining the process whereby district courts may bring interlocutory appeals to circuit courts to decide controversial legal issues).

534. It is somewhat relevant to my earlier proposal to promulgate Local Rules of the Circuit to note here that in 1992 Congress amended the jurisdictional statute by adding a new section that authorizes the Supreme Court to promulgate rules authorizing interlocutory appeals within the federal system. 28 U.S.C. § 1292(e) (Supp. V 1993).

535. Peters, *supra* note 496, at 1893 (paraphrasing Malcolm M. Lucas, *Keynote Address at the National Conference on State-Federal Judicial Relationships*, 78 VA. L. REV. 1663, 1669 (1992)).

536. Cf. Note, *To Form a More Perfect Union: Federalism and Informal Interstate*

need to worry together about certain problems, and they need to devise solutions together.

1. Organization

To worry together and to find solutions together, the judiciaries must first come together. The national bodies representing state and federal courts are the Conference of Chief Justices and the Judicial Conference of the United States. State jurists serve on the Judicial Conference's various Rules Committees. Both the Judicial Conference and the Conference of Chief Justices have standing committees consisting of state and federal judges who are charged with an ongoing assessment of ways to improve relations between the two judicial branches. Meetings of these committees and meetings of individual leaders and representatives of the state and federal judicial branches on particular topics increase the familiarity and knowledge critical to cooperation.

There needs to be greater interaction, in the future, between the support organizations of both judiciaries. The Administrative Office of U.S. Courts and the Federal Judicial Center and their state administrative counterparts should be expected to emulate the judges. They should come together on an organized and regular basis to keep each other informed, bring to bear their expertise on common problems, and facilitate greater cooperation between the state and federal courts.

Traditionally, the Conference of Chief Justices and the Judicial Conference of the United States have been inwardly oriented, but a signal event for the future of judicial federalism was the creation of the National Judicial Council of State and Federal Courts.⁵³⁷ The concept originated in a resolution of the Conference of Chief Justices that was endorsed by the Federal Courts Study Committee.⁵³⁸ The two parent conferences created the National Judicial Council in 1990 and positioned it between themselves and the state-federal councils.⁵³⁹ Its charge was:

Cooperation, 102 HARV. L. REV. 842, 844-47 (1989) (discussing generally the importance of cooperation between the federal government and the separate state governments but not specifically addressing the courts).

537. See Edward B. McConnell, *Planning for the State and Federal Courts*, 78 VA. L. REV. 1849, 1854-57 (1992) (describing the impact of the creation of the National Judicial Council of State and Federal Courts).

538. See STUDY COMMITTEE REPORT, *supra* note 416, at 52-53.

539. McConnell, *supra* note 537, at 1854.

first, to review the work of these local councils, so as to identify problems of national concern to the state and federal courts; second, to consider reports made by the state-federal relations committees of its two parent conferences; third, to prepare an annual report setting forth its program for the year; fourth, to convene an annual conference to discuss its report and the issues therein identified; and fifth, to undertake such other activities as might advance the purposes of state-federal judicial system cooperation.⁵⁴⁰

At the next level of cooperation we find the state-federal judicial councils organized at the state level. These were initiated by Chief Justice Burger and enjoyed a peak level of activity during the 1970s, then all but disappeared during the 1980s, and now are making a comeback that seems encouraging.⁵⁴¹ One of the priorities for these reincarnations is to achieve some continuity.⁵⁴² They owe their first incarnation to a perception of growing friction between the state and federal courts. Their resurgence may be fairly attributed to a perception of growing commonality.⁵⁴³ The new emphasis is on communication, cooperation, and coordination. There has been some sentiment expressed that the next logical organization, at least in larger cities, is a metropolitan state-federal judicial council.⁵⁴⁴ At the metropolitan level, the local council could function as a clearinghouse to inform, encourage, and promote the expansion of successful judge-to-judge initiatives in judicial federalism.

All these conferences and councils must have some reason for being, something to do. And one thing they do is hold meetings and sponsor conferences. Over the last several years, state and federal judges have participated in many important national meetings: the 1990 Conference on the Future of the Courts; the 1990 National Conference on Court Management; the 1992 National

540. *Id.* at 1854-55.

541. *See id.* at 1856-57 (stating that although only nine state councils were active in 1980, 19 were active in 1990).

542. *See generally* Office of Interjudicial Affairs, *Organizing and Using a Council of State and Federal Judges* (Fed. Jud. Ctr. ed., 1993) (explaining how to organize and maintain continuity).

543. William W. Schwarzer, *Long-Range Planning Suggestions for State-Federal Judicial Councils*, PROC. OF THE W. REGIONAL CONF. ON ST.-FED. JUD. RELATIONSHIPS, June 4-5, 1993, at 70, 71.

544. *Id.* at 73.

Conference on Court Technology; and the 1992 National Conference on State-Federal Judicial Relationships.⁵⁴⁵ These national meetings have been followed up by the 1993 Western Regional Conference on State-Federal Judicial Relationships and this 1994 Middle Atlantic State-Federal Judicial Relationships Conference. Meetings and conferences are important because a critical mass is necessary for the generation of the new ideas that are so critical to court reform.⁵⁴⁶

The state-level councils appear to be at risk for repeating the cycle of decline from which they have only recently recovered. During that past cycle, the councils declined due to insufficient funding and staffing, lack of leadership, an inability or an unwillingness to deal with certain issues, a failure to set substantive priorities, and, most of all, the disillusionment which follows unrealistic expectations.⁵⁴⁷ In many of the councils' accounts of themselves from the present cycle, several themes emerge: the need for assuring continuity, the importance of dialogue, and the background uncertainty of their mission.⁵⁴⁸ At their meetings, judges, who like other busy people have too many meetings to attend, seem to find themselves looking around for something to do.

In the future, as they struggle to define their mission, it will be important not to expect too much from the state-level councils. They exist as ad hoc bodies with a primary goal of communication rather than as official institutions with public policy responsibilities.⁵⁴⁹ They are valuable as a needed forum.⁵⁵⁰ Borrowing a

545. McConnell, *supra* note 537, at 1857 (listing conferences from 1971 to 1992).

546.

We can start by letting ideas flourish. Ideas are the critical mass of communications and the fuel of politics. Some ideas succeed and others do not. The only risk in sharing ideas is that dreams of successful implementation and execution may exceed reality. What is the alternative?

Robert W. Kastenmeier, *Let Ideas Flourish: How We Can Improve Our Justice System*, 72 JUDICATURE 122 (1988).

547. Samuel W. Phillips, Creating and Sustaining Successful State-Federal Judicial Councils, Middle Atlantic State-Federal Judicial Relationships Conference (1994) (outline explained in speech at conference is available with author).

548. See, e.g., *Reports of State-Federal Judicial Councils: State-by-State Priorities*, PROC. OF THE W. REGIONAL CONF. ON ST.-FED. JUD. RELATIONSHIPS, June 4-5, 1993, at 82-92 (including descriptions of the atmosphere of state-federal judicial relationships and goals in the near future for judicial councils for the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington).

549. Schwarzer, *supra* note 543, at 70.

550.

Activities such as these, which bring together judges and administrators from

page from the experiences in the Ninth Circuit, state-level councils should consider sponsoring meetings and symposia on judicial federalism issues of a recurring nature, such as capital habeas proceedings or bankruptcy.⁵⁵¹ They can exchange information about studies of gender fairness in the courts and how to orchestrate appropriate responses. They can trade ideas on handling prose litigation, the use of interpreters, and scheduling around counsel conflicts. Issues about televising trials and appeals have been merely postponed by the Judicial Conference's recent decision to discontinue the federal experiment; there are some who want Congress to get into the act.⁵⁵² State courts have a great deal to teach federal courts about media.

State-level councils do have some potential to act as the interface between the judiciaries and the state legislature. Additionally, they represent additional potential for grassroots lobbying of the state's congressional delegation, but this will require coordination from the National Judicial Council for the State and Federal Courts.

2. Relations with the Political Branches

Courts always have and always will depend on the kindness of strangers, strangers in the executive and legislative branches.⁵⁵³ This audience need not be reminded that "[i]n the long run, legislators are indispensable to properly functioning courts."⁵⁵⁴ In the future, the various judiciary-to-judiciary bodies must work in con-

both the state and federal systems, as well as attorneys who practice in both forums, are effective for the sharing of ideas and experiences and for learning new and better ways of doing things.

McConnell, *supra* note 537, at 1857.

551. See, e.g., William W. Schwarzer, *State-Federal Judicial Councils: the National Experience* (1994) (outline listing such meetings, symposiums, and achievements is available with author).

552. See Tony Mauro, *Camera Debate Was Sloppy and Shallow*, *LEGAL TIMES*, Sept. 26, 1994, at 10 (criticizing decision to keep cameras out).

553. "Whoever you are—I have always depended on the kindness of strangers." THOMAS "TENNESSEE" WILLIAMS, *A STREETCAR NAMED DESIRE* act III, sc. 11, at 170 (1953) (quoting character of Blanche DuBois). For a discussion of policies Congress should adopt when enacting legislation regarding judicial administration, see Cornelius M. Kerwin, *Judicial Implementation of Public Policy: The Courts and Legislation for the Judiciary*, 16 *HARV. J. ON LEGIS.* 415, 439-40 (1979) (concluding that the judiciary and legislature should reach a consensus, the legislation should not be overly specific and the legislation should attempt to utilize existing judicial structure).

554. Meador, *supra* note 386, at 1897.

cert to improve relations with the legislative branch. The 1990 National Conference on Legislative-Judicial Relations,⁵⁵⁵ attended by state and federal leaders from both branches, made the following recommendations for the future of interbranch relations: "(1) increased use of formal communication mechanisms; (2) development within states of coordinated statements of judicial branch views on legislation so that the judiciary can speak to the legislature with a single voice; (3) establishment of interbranch educational and orientation programs on branch procedures, perspectives, and problems; (4) encouragement of outside groups, such as bar associations, to serve as intermediaries between the legislature and the judiciary; (5) use of court and legislative staff to serve as interbranch liaisons; (6) increased use of legislative and judicial study commissions and task forces composed of representatives appointed by each branch; and (7) state and regional conferences to improve local legislative-judicial relationships."⁵⁵⁶

The importance of good relations with the state legislature for finding solutions for the current court funding crisis was discussed above. But state legislators also bear the responsibility for the statutory jurisdiction and organization of the state courts and for the selection and tenure arrangements for state judges.⁵⁵⁷ A former state legislator described the common general legislative perspective on the judiciary that must be overcome: "[T]here is a combination of awe and resentment toward judges—especially from nonlawyer legislators—judges are aloof and remote—except when they want a pay raise—and judges are paid a lot more than lawmakers."⁵⁵⁸ Given the trend in many state legislatures toward higher percentages of nonlawyer members, legislative attitudes toward the courts are likely to worsen, unless the judiciary succeeds in dispelling these misperceptions.⁵⁵⁹ The tradition of the independent judiciary and the lore of separation of powers oblige the judicial branches to proceed "judiciously" in such matters, to remain apart from the rough and tumble of ordinary politics. The members of the judicial branches, however, would be derelict in

555. See Andrew D. Christie & Nancy C. Maron, *Find a Better Way to Work with the Legislature: How to Establish a Constructive Relationship*, JUDGES' J., Summer 1991, at 14 (discussing the participants and the purposes of the conference).

556. McConnell, *supra* note 14, at 9, 13, 40.

557. Meador, *supra* note 386, at 1898.

558. Ira Pilchen, *The Future and the Courts: A Perspective from Illinois*, 76 JUDICATURE 137, 142 (1992).

559. *Id.*

their duty if they did not participate in the public policy relating to court issues.⁵⁶⁰

As was discussed above, Congress directly controls federal court jurisdiction. Indirectly, the federal jurisdiction statutes determine the respective role of the state courts. Congress deserves the credit or the blame for "federalization." (Recall the potential case-load implications attributable to the proposals for federal health care legislation.) Congress, as a matter of constitutional course, determines the budget of the federal courts.⁵⁶¹ Congress lately also has wielded a significant power over the funding of state courts. The \$30 billion Violent Crime Control and Law Enforcement Act of 1994 is the most recent example. Thus, Congress is the proverbial 800-pound gorilla in any picture of the future of the state and federal courts. Just getting along with a gorilla is difficult enough, getting one to do something is even more of a challenge. What makes this so difficult is that "Congress is largely oblivious of the well-being of the judiciary as an institution, and the judiciary often seems unaware of the critical nuances of the legislative process."⁵⁶² In the movie "Cool Hand Luke," remember what the warden told Paul Newman when he was having problems adjusting to this kind of authoritarian relationship: "What we've got here is a failure to communicate."⁵⁶³

The federal judiciary and the state judiciary need each other's help. A friend of mine, who currently sits on the federal bench and who previously sat on his state's supreme court, a judge of some reputation and bearing, told me about the time he was making a call on a member of Congress about some issue important to the federal judiciary. After only a few minutes, the member took another call and shuttled the judge onto a staffer, who listened briefly until he determined the subject matter. Then the staffer interrupted to explain to the judge how busy he was on other more important, more pressing matters and the meeting ended. The judge left frustrated without being heard.

560. Cf. Edward N. Beiser, *Perspectives on the Judiciary*, 39 AM. U. L. REV. 475, 477-79 (1990) (describing the tension between the need to resolve disputes using precedent and the need to make policy decisions as "institutional schizophrenia").

561. See generally Thomas G. Walker & Deborah J. Barrow, *Funding the Federal Judiciary: The Congressional Connection*, 69 JUDICATURE 43 (1985) (discussing different strategies the federal judiciary uses to obtain proper funding from Congress).

562. Robert A. Katzmann, *The Underlying Concerns*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 54, at 7.

563. FRANK R. PIERSON, COOL HAND LUKE (1967) (screenplay).

What can be done? I submit that state and federal judges must join forces to advocate their shared agenda for judicial federalism. They must maximize their contacts and influence. First, the judicial federalism agenda for the future must be established by the state-national bodies working together. This is not intended as any threat to the autonomy of the National Conference of Chief Justices or the Judicial Conference of the United States. Second, the judiciaries must rely on existing mechanisms and develop new mechanisms for dealing with Congress.⁵⁶⁴ The Legislative and Public Affairs Office in the Administrative Office of U.S. Courts is an example of a familiar mechanism. Different new mechanisms need to be imagined to work more directly with two different groups: the members and staff of the Judiciary Committees, who are more knowledgeable about court issues, and the members and staff of the Authorizing Committees/Appropriations Committees as well as the other committees that can and do affect the courts. These new mechanisms should be designed differently to deal with different stages of the legislative process: problem identification and initiation of legislation, consideration and enactment, and postenactment oversight.⁵⁶⁵

In the past, more emphasis has been placed by the judiciary on the judge-to-member contact than on the staff-to-staff contact. My story about my federal judge friend, however, illustrates why it will be important in the future for the courts to have permanent staff with full-time responsibilities for congressional liaison. Ongoing relationships at this level are essential for the long term.⁵⁶⁶ New mechanisms for improving the relationship between the courts and Congress might resemble existing mechanisms between Congress and the executive branch. One best example is the Advisory Commission on Intergovernmental Relations that was created by Congress "to monitor the operation of the American federal system and to recommend improvements."⁵⁶⁷

I must confess that I am not hopeful. The future of the courts, state and federal, is in large part under the control of Congress.

564. Robert A. Katzmann, *The Continuing Challenge*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 54, at 185.

565. *Id.*

566. *See id.* at 188 (discussing various methods for bringing these two groups closer together).

567. *Id.* ("It is a permanent national bipartisan body, created by Congress, representing the executive and the legislative branches of the federal, state, and local governments and the public.").

Currently, the importance of judicial federalism is lost on members and preserving it will demand a higher degree of care than I see them devoting to any issue today. But I cannot improve on the concluding observations of the 1986 Brookings Institution colloquium on the relationship between the courts and Congress:

Apart from reaching some understanding about the ground rules for communication and issues relating to statutory construction, interpretation, and revision, it is vital to consider practical ways to improve the mechanisms for interaction between the judiciary and Congress. Such an analysis has at least three components: evaluating structural change within the judiciary and Congress; applying lessons from other approaches; and ascertaining ways to promote ongoing exchanges.⁵⁶⁸

As for the other political branch, the relationship between the judiciary and the executive branch understandably receives less attention than that with the legislative branch, "[b]ut it would be a mistake to ignore the necessity for establishing better channels of communication with the executive."⁵⁶⁹ At the national level, the Department of Justice is a likely ally on many issues. These days it does not have the focus it once had when there was an Office for Improvements in the Administration of Justice,⁵⁷⁰ but the Office for Policy Development has possibilities.⁵⁷¹ On the state side, the relationship between the state judiciary and the governor is critical to any hope for improvement in the state of the courts.

3. Mobilizing "Friends of the Courts"

Building a consensus among those inside the judicial branches is a means toward the end of influencing the legislative branches for the good of the courts. That consensus ought to be broadened

568. *Id.* at 185. The present author was a colloquium participant. *Conference Participants*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 54, at 193. See also Robert A. Katzmann, *Wayne Morse Forum, November 10, 1992: Have We Lost the Ability to Govern? The Challenge of Making Public Policy*, 72 ORE. L. REV. 229, 243-46 (1993) (discussing proposed mechanisms for increasing understanding between the judiciary and the other branches).

569. COFFIN, *supra* note 42, at 321.

570. See generally Daniel J. Meador, *Origin of the Federal Circuit: A Personal Account*, 41 AM. U. L. REV. 581 (1992) (discussing the reasons for establishing the Office for Improvements in the Administration of Justice).

571. COFFIN, *supra* note 42, at 322.

to include those outside the judiciary who use the courts: the bar, the academy, and the public. These groups represent possible allies for the judges, but they also have a great stake in the effective administration of the courts. Involving the private sector brings different perspectives and additional resources to the judicial federalism effort. Broader involvement also makes it more difficult for the legislative branches to practice benign neglect of the courts.

This will require a great deal of communication and coordination among existing judiciary and judiciary-related entities, including the Judicial Conference of the United States, the Conference of Chief Justices, the National State-Federal Judicial Council and state level councils, the National Conference of State Trial Judges, the National Conference of Federal Trial Judges, the Conference of State Court Administrators, the Administrative Office of U.S. Courts, the Federal Judicial Center, the National Center for State Courts, and the State Justice Institute.

a. The Bar

Members of the bar have a different perspective on the courts than judges.⁵⁷² They are concerned, and should be, about the problems facing the courts. They are worrying about such issues as the displacement of civil trials by drug cases and the implications for greater reliance on alternative dispute resolution. They will have to keep up with how the law will deal with scientific advances and how courts will rely on new technologies, such as computers and electronic filings. Most importantly, members of the bar must insist that "[t]he strength and vitality of [the] court[s] cannot be compromised by inadequate compensation, poorer facilities or working conditions, or insufficient support staff."⁵⁷³ The organized bar is in a position to come to the aid of the courts. Legislators must hear lawyers' voices alongside the judges'. It is incumbent on the judges to involve the bar.

More bar participation at conferences like this is in order. But bar representatives also ought to be included on the state-federal judicial councils. Those councils, in turn, ought to encourage state and national bar associations to form standing bench-bar committees charged with the responsibility to work for court reform and

572. See, e.g., Pamela J. White, *The Future From a Practitioner's Perspective*, 50 MD. L. REV. 71, 71-74 (1991).

573. *Id.* at 73.

improvements in the state legislatures and in Congress. The judiciaries need to organize themselves to sustain a long term dialogue with the courts. Within that ongoing relationship, the bar must contribute to judicial initiatives inside the courts and with the legislative branches. For the judges' part, they will be obliged to accept members of the bar as equal partners in finding solutions for the problems facing the courts.⁵⁷⁴

Does anyone doubt whether the organized bars and their memberships will assume a prominent role in the debates over the issues discussed earlier in this paper: court funding, alternative dispute resolution, futures studies, federalization, and reform of jurisdiction and procedure?⁵⁷⁵ The bar already is motivated. It will be up to the judiciary, in the future, to activate the bar and to involve lawyers in a meaningful way in judicial federalism initiatives. Lawyers, by their numbers and influence, are critical to the success of these initiatives.⁵⁷⁶ Existing entities, such as the A.B.A.'s Judicial Administration Division and Appellate Judges' Conference, must be redirected to take the lead on relevant court issues.

b. The Academy

You might suppose that judges could be confident of recruiting numerous allies among the law professorate.⁵⁷⁷ But these days one encounters some strange characters in the groves of academe.⁵⁷⁸ The judicial branches will have to borrow the strategy

574. "Today's lawyer must also contribute by assuming his or her share of the problem-solving duty." J. Clifford Wallace, *The Future of the Judiciary: A Proposal*, 27 CAL. W. L. REV. 361, 365 (1991).

575. *Perceptions of the Bar*, PROC. OF THE W. REGIONAL CONF. ON ST.-FED. JUD. RELATIONSHIPS, June 4-5, 1993, at 56-63 (discussions of these issues).

576. See generally Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994) (examining the reasons why American lawyers are seen as major actors responsible for major problems); Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345 (1994) (suggesting ways in which the explosive growth in the legal industry can be channelled to better society); Symposium, *The 21st Century Lawyer: Is There a Gap to Be Narrowed?*, 69 WASH. L. REV. 505 (1994) (discussing the need for law schools to restructure their curriculums in order to better prepare their students to practice in the profession).

577. See generally Kenneth F. Ripple, *The Judge and the Academic Community*, 50 OHIO ST. L.J. 1237 (1989).

578. This is not intended as a slight against academic diversity. Professor Althouse tells the story of a visit by Chief Justice Rehnquist to speak at her law school:

from the marines and sign up a few good professors.

Several years ago, U.S. Circuit Judge Harry T. Edwards addressed the annual meeting of law teachers and complained that legal education is "falling short of any meaningful effort to 'shape the legal profession.'"⁵⁷⁹ Having traded academic tenure for Article III tenure, Judge Edwards was secure enough to follow up that address with a 1992 article in the *Michigan Law Review* expressing his deep concern about "the growing disjunction between legal education and the profession."⁵⁸⁰ He worried that the law schools and the profession were moving in opposite directions. He charged that the law schools were not doing what they should be doing: "training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use."⁵⁸¹ Judge Edwards described the response to his article as "nothing short of extraordinary."⁵⁸² He was "overwhelmed" and "amazed" at the positive reactions from all directions.⁵⁸³ The academy, apparently unaware of the irony, reacted by holding a symposium about Judge Edwards' article, offering various explanations and defenses to his charge.⁵⁸⁴

Frankly, I do not understand all the fuss. Judge Edwards' story is not a "man bites dog" kind of headline. Pull any issue of a

The Chief told some jokes, elaborated on his ties to Wisconsin, and discoursed at length about the *workload* of the courts. The issues were neutral, administrative, managerial, structural.

"Did he say anything provocative?" asked a colleague who had missed the speech.

"He never got any more provocative than to say he's against diversity."

My friend was shocked. "He's against *diversity*!!!?"

"Diversity *jurisdiction*," I said, realizing she was not a proceduralist.

Ann Althouse, *Late Night Confessions in the Hart and Wechsler Hotel*, 47 VAND. L. REV. 993, 994 (1994).

579. Harry T. Edwards, *The Role of Legal Education in Shaping the Legal Profession*, 38 J. LEGAL EDUC. 285, 285 (1988).

580. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992).

581. *Id.*

582. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2191 (1993).

583. *Id.* at 2193. See also Harry T. Edwards, *Another "Postscript" to "The Growing Disjunction Between Legal Education and the Legal Profession"*, 69 WASH. L. REV. 561, 562 (1994) (expounding further on the overwhelming responses to his article).

584. See Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993). Some predict that in the future, technology will narrow the gap. See Ronald W. Staudt, *Does the Grandmother Come With It?: Teaching and Practicing Law in the 21st Century*, 44 CASE W. RES. L. REV. 499 (1994) (offering suggestions on how 21st century communications technology can draw together law professors and practicing professors).

prestigious law review and read the table of contents. Many of you are judges, ask yourself when was the last time you found a law review article helpful in your judicial decisionmaking.⁵⁸⁵ Law professors mostly write articles for each other.⁵⁸⁶ Like their university colleagues, most law school professors are in thrall to theory.⁵⁸⁷ I am guilty of some of it myself.⁵⁸⁸

Most law professors, like most judges and most lawyers, do not spend a lot of time thinking about the great issues of court administration.⁵⁸⁹ But some do. Judges should recruit professors who regularly teach courses about the state and federal courts to get involved in court reform. Many of these professors served as

585. See Patricia M. Wald, *Teaching the Trade: An Appellate Judge's View of Practice-Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 42 (1986) (stating that "too few law review articles prove helpful in appellate decision making.").

586. See Conference on Constitutional Law: Constitutional Theory and the Practice of Judging, 63 COLO. L. REV. 291 (1992) (debating to whom constitutional theorists are speaking and if anyone is listening).

587.

In the mid-1960s, higher education in the United States began "a gradual but ineluctable movement away from substance toward theory, away from the empirical data of field studies . . . toward ideological readings of the data.

.....

During the 1970s and the '80s, the theoretical menu expanded and diversified, accommodating a number of special-interest or grievance-group agenda (e.g., feminism, environmentalism) as well as a flurry of Continental intellectual fashions, including structuralism, poststructuralism, and deconstruction.

.....

In fairness, the academy, or at least a significant part of it, has already recognized the error of its ways. Substance is making a comeback, even in the nation's better universities. . . . The return to substance has not yet been decisive, and perhaps it never will be, but the theory-mongers no longer appear to be in the ascendancy.

Jay Tolson, *By Theory Possessed*, WILSON Q., Summer 1994, at 4, 4-5. See also Mark Tushnet, *Erudition in the Law Reviews*, 44 J. LEGAL EDUC. 249 (1994) (lambasting three badly written law review articles).

588. See Thomas E. Baker, "The Right of the People to Be Secure . . .": Toward A Metatheory of the Fourth Amendment, 30 WM. & MARY L. REV. 881 (1989).

589. Here is what a practicing lawyer said about a paper on federalism written by a nationally prominent professor at the top-ranked law school:

The paper is court centered. . . .

The paper is ignorant of actual administrative structure and practice. . . .

The paper is extremely weak in prescriptions that would be useful to a political executive, agency administrator, or legislator. . . .

The irony of these failings is that we are living in a period of great ferment about "federalism."

Ben W. Heineman, Jr., *The Law Schools' Failing Grade on Federalism*, 92 YALE L.J. 1349, 1349-50 (1983).

law clerks. The state-federal judicial councils need to encourage individual judges to call on their former clerks to get involved. Judges need to establish a presence in the law schools.⁵⁹⁰ Particularly on the state side, one of the unmined resources available to judges are the internship/externship programs at law schools that provide student research assistants in chambers.⁵⁹¹

But the law schools and law professors need to involve themselves, as well. Law professors can be counted on to involve colleagues in the social sciences. They should provide the necessary research for future structural and procedural reforms.⁵⁹² Too often, past debates over court reform have been merely anecdotal rather than empirical.⁵⁹³ Too often, the promise of reforms has been exaggerated over actual results.⁵⁹⁴ At universities, judges can find researchers who are experts in social scientific, empirical research, experts who can analyze demographic trends, weigh conflicting data, and determine how to collect additional data on future demands on the courts. Court reformers need to be reminded of Justice Holmes' observation, "[i]gnorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning."⁵⁹⁵ Initiatives for judicial federalism must be informed by research. The universities can contribute alongside the Administrative Office of U.S. Courts, the Federal Judicial Center, the National Center for State Courts, and the State Justice Institute.

There is one important quasi-academic forum worthy of separate mention: the American Law Institute. The American Law Institute is preliminarily considering a project to formulate a revision of Title 28 of the United States Code, the provisions for fed-

590. Starr, *supra* note 452, at 8.

591. See *id.* at 7 (urging judges to make greater use of law students as interns and externs); JOHN B. OAKLEY & ROBERT S. THOMPSON, *LAW CLERKS AND THE JUDICIAL PROCESS* 27-29 (1980) (providing a brief description of judicial externship programs).

592. Wallace, *supra* note 574, at 364.

593. See generally Baker, *supra* note 324, at 334 (noting that "the rulemaking process primarily relies on research by the reporters and on the informed intuition of the members of the Advisory Committees and the Standing Committee"); Symposium, *Empirical Studies of Civil Procedure*, 51 *LAW & CONTEMP. PROBS.*, Summer 1988, at 1 (calling attention to the problems and issues facing empirical study programs).

594. Geoff Gallas, *Court Reform: Has It Been Built on an Adequate Foundation?*, 63 *JUDICATURE* 28, 35-37 (1979).

595. OLIVER W. HOLMES, JR., *THE COMMON LAW* 64 (Mark DeWolfe Howe ed., 1963) quoted in Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 *BROOKLYN L. REV.* 841, 841 n.1 (1993).

eral court jurisdiction. Professor John B. Oakley was commissioned to prepare a prospectus for the project. The last time the Institute examined this area, at the request of Chief Justice Earl Warren, the effort culminated in the 1969 *Study of the Division of Jurisdiction Between the State and Federal Courts*.⁵⁹⁶ The 1969 study focused primarily on the district courts and the their major heads of jurisdiction. It was more noteworthy for bringing attention to problems of jurisdiction than as a catalyst for legislation. By contrast, the study now being proposed is expected to "produce a set of recommendations that, insofar as they take statutory form, would have a realistic chance of adoption, in large part at least, by the Congress."⁵⁹⁷ This will be a most important forum for debating issues of judicial federalism in the short term future. It should be incumbent on the National Judicial Council of State and Federal Courts to monitor this development and to participate actively on behalf of jurisdictional initiatives to restore some of the balance to the federalism divide between state and federal courts, first before the American Law Institute and then before the Congress.

c. The Public

The present trend will continue in the future. The consumer's view will be important: "In the future the public will be watching the courts more closely and judging the judges."⁵⁹⁸ The public is a critical ally in any political matter, including the politics of court reform. Court reform frequently is the victim of organized special interests with specific agendas. Anyone in Congress will tell you that it is far easier to kill a bill than it is to pass legislation. The state and federal judiciaries need to develop what U.S. Circuit Judge Frank M. Coffin calls citizen surrogates: "a non-partisan watchdog citizen group, respected by the media and the citizenry generally, which would therefore be able to have its voice heard on the most vital issues affecting the courts."⁵⁹⁹ The bar should act as an intermediary between the judiciaries and these groups, to

596. AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* (1969).

597. Memorandum from Professor John B. Oakley, University of California at Los Angeles, to Interested Persons 1 (May 10, 1994) (on file with author).

598. Shirley S. Abrahamson, *The Consumer and the Courts*, 74 JUDICATURE 93, 94 (1990).

599. COFFIN, *supra* note 42, at 322.

organize and focus their efforts on behalf of judicial federalism.⁶⁰⁰ In fact, the A.B.A. has begun this initiative through its National Coalition for Justice, an effort to unite lawyers and laypersons in efforts to improve the justice system.⁶⁰¹ Other bar groups need to be involved as well, such as the American College of Trial Lawyers and the National Lawyers' Guild. Public interest groups like Common Cause also can be expected to support the effort to improve the court system. Coordinating these efforts must take place at the national level, so this is a task for the National State-Federal Judicial Council, but the state-federal judicial councils at the state level can be expected to get involved.

Judge Coffin advises that the judiciaries also must reach out to the public more generally, to educate voters about the court system.⁶⁰² To accomplish this, the courts will have to overcome the public's lack of confidence in government generally and in the political system.⁶⁰³ Public opinion polls reveal that the average citizen is unfamiliar with the courts.⁶⁰⁴ This can take many varied forms, beginning with effective programs in the public schools and before other civic groups.⁶⁰⁵

The people need to be educated about the importance of the courts and their problems.⁶⁰⁶ In the past, judges have done these sorts of public appearances as a matter of routine; in the future, these appearances will be more critical as the issues facing the courts become more politicized. All politics, including judicial politics, is local.⁶⁰⁷ This attitude applies inside the courtroom as well. There, judges must exercise a positive control for the sake of

600. See Frank M. Coffin, *Communication Among the Branches: Can the Bar Serve as a Catalyst?*, 75 JUDICATURE 125, 126 (1991) (calling for the bar to act as a catalyst in organizing the citizen groups).

601. Don J. DeBenedictis, *Facing the Justice Deficit*, A.B.A. J., Oct. 1992, at 109, 109; *Excerpts from a Report by the ABA Special Committee on Funding the Justice System*, JUDGES' J., Winter 1992, at 7, 42-43.

602. COFFIN, *supra* note 42, at 323-25.

603. See Public Confidence in the Judiciary, PROC. OF THE W. REGIONAL CONF. ON ST.-FED. JUD. RELATIONSHIPS, June 4-5, 1993, at 64 (beginning a dialogue about how public confidence in the judiciary is affected by various behaviors and actions).

604. *Id.* at 66.

605. *Id.* at 68-69.

606. Frank X. Gordon, Jr., *The Judicial Image: Is a Facelift Necessary?*, JUST. SYS. J., Winter 1985, at 315, 315-16; see H.R. REP. NO. 512, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6879, 6889 (expressing concern about the lack of public awareness of legislation aimed at judicial improvement).

607. *Public Confidence in the Judiciary*, PROC. OF THE W. REGIONAL CONF. ON ST.-FED. JUD. RELATIONSHIPS, June 4-5, 1993, at 67.

litigants, jurors, and witnesses.⁶⁰⁸ These interactions with the court systems shape public perceptions.⁶⁰⁹

That brings us to television. Like it or not, the unblinking eye is the icon of our culture.⁶¹⁰ People's perceptions of the courts, and nearly everything else, are formed by television.⁶¹¹ Television represents "one particularly appealing vehicle for fostering greater public awareness of the courts' day-to-day activities."⁶¹² All but a handful of states allow television coverage of court proceedings and the federal courts recently conducted an experiment with television.⁶¹³ "Court TV" is a national cable television channel with more than 14 million subscribers, dedicated exclusively to covering judicial proceedings.⁶¹⁴ The O.J. Simpson prosecution has made a media star out of Judge Lance Ito. Have judges been prepared to put their best foot forward, instead of in their mouths? Should not judicial education programs be designed to train judges in some basic on-camera skills. I should not be heard to advocate "playing to the camera." The story of a trial has its own drama without staging, and the judge's role is and must remain dignified. Think of it from the other direction, however. When actors portray lawyers and judges, they always bring in legal advisors to show them how lawyers and judges act.

The press, electronic and print media, fit here in this discussion. Press coverage affects public understanding and political

608. See Susan Snow & Steve Friedland, *The Judge as Healer: A Humanistic Perspective*, 69 DENVER U. L. REV. 713, 714 (1992) (favoring a humanistic approach to the judicial process over which judges have control in order to effect a more positive outcome for litigants).

609. See Abrahamson, *supra* note 598, at 95 (noting that inappropriate judicial demeanor is a frequently voiced public concern about the judiciary).

610. Cf. Thomas E. Baker, *C-SPAN: A Guide for Law Professors*, 40 J. LEGAL EDUC. 295, 296 (1990) (describing the role television plays in a student's education, including a law student's education). The Federal Judicial Center has experimented with C-SPAN broadcasting of a seminar. Denis J. Hauptly, *The Future of Judicial Education*, 40 FED. B. NEWS & J. 503, 507-08 (1993).

611.

We live in an age when people depend upon television to get information. One national survey found that 65 percent of the people get most of their news from TV and 50 percent get all of their news from TV.

R. William Ide III, *A Grassroots Commitment*, A.B.A. J., Aug. 1994, at 8.

612. *The Future of Our Federal Courts*, 74 JUDICATURE 4, 4 (1990).

613. Thomas E. Baker, *May It Please the Court: The Most Significant Oral Arguments Made Before the Supreme Court Since 1955*, 69 TULANE L. REV. 319, 322 (1994) (book/tape review).

614. Harris, *supra* note 133, at 803-07.

reactions to individual cases as well as the court system in general.⁶¹⁵ Courts are joining the game late, but they are employing media relations experts and training judges in press relations.⁶¹⁶ The Supreme Court of the United States has had a Public Information Officer since 1935.⁶¹⁷ The Federal Courts Study Committee endorsed various proposals to improve future relations between the courts and the media, including employing media experts, holding "press days," training judges as spokespersons, and expanding publications and programs about the courts.⁶¹⁸

Education of the public must be a centerpiece on the agenda for state-federal initiatives. The public needs to know about the courts. Indeed, the courts need to have a greater understanding of their constitutional role, their organization, their operation and procedures, their problems and their proposed solutions.⁶¹⁹ Coping with the challenges of the future will oblige the courts to take a far more activist and political role than at any previous time in our history. I borrow Judge Coffin's summary:

The important point is that state and federal courts must make room in their crowded agenda for educational outreach, must obtain expert advice, and must devise a program for carrying their cause to the people, because, in the last analysis, it is the people's cause also.⁶²⁰

615.

Through its decision whether to report a case, from whom to solicit comments on the case, and how to react editorially, the press affects not only how widely a decision will be known but also what the political reaction will be. Press coverage very often heavily influences whether litigants will appeal, whether the political branches will take counteraction, even what the aura surrounding a decision will be when it comes to the attention of higher courts.

Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 895 (1987).

616. *Id.*

617. THE OFFICE OF THE CHIEF JUSTICE, WHITE BURKETT MILLER CENTER FOR PUBLIC AFFAIRS 56 (Peter G. Fish ed., 1984).

618. STUDY COMMITTEE REPORT, *supra* note 416, at 164-65.

619. McConnell, *supra* note 14, at 40.

620. COFFIN, *supra* note 42, at 324; see also Deanna Reece Tacha, *Renewing Our Civic Commitment: Lawyers and Judges as Painters of the "Big Picture,"* 41 U. KAN. L. REV. 481 (1993) (discussing why lawyers and judges should take on a public education role).

E. A Postscript on Judicial Federalism Initiatives

In the future, as in the past, judicial federalism initiatives will not be easily accomplished. Judicial federalism is not itself inevitable. It represents a choice by state and federal judges to come together for the common good of all who rely on the courts. Courts and judges, state and federal, have the highest and ultimate responsibility to the people:

It is worth emphasizing—because it tends to be forgotten—that in the final analysis courts do not exist to govern themselves effectively. The appropriate standard by which to judge court governance arrangements is not whether they produce impressive budgeting systems or extensive legislative contact. The correct standard is whether governance helps judges “to secure the just, speedy, and inexpensive determination of every action”—weighing the costs of federal [and state] adjudication to both parties and taxpayers.⁶²¹

V. CONCLUSION

The Robert Frost poem from which my subtitle is taken could have been describing my participation in this conference.⁶²² During this segment, we have resembled those people on the beach who spend their time looking out to sea. When we look into the future of judicial federalism, we need to appreciate what we are capable of seeing—that we cannot see out too far or in too deep. Whatever we are doing, it is not the scientific method.⁶²³ My ap-

621. RUSSELL R. WHEELER & GORDON BERMANT, *FEDERAL COURT GOVERNANCE: WHY CONGRESS SHOULD—AND WHY CONGRESS SHOULD NOT—CREATE A FULL-TIME EXECUTIVE JUDGE, ABOLISH THE JUDICIAL CONFERENCE, AND REMOVE CIRCUIT JUDGES FROM DISTRICT COURT GOVERNANCE* 89-90 (Fed. Jud. Ctr. ed., 1994) (footnote omitted).

622. See generally Michael E. Tigar, *2020 Vision: A Bifocal View*, 74 JUDICATURE 89, 89-90 (1990) (urging the courts look to the vision of poets to quicken their sense of humanity).

623. This is true of our efforts to look forward as well as our efforts to look backward for guidance about what we should expect and how we should react. Grant Gilmore once debunked the misperception of these activities as “science”:

For two hundred years we have been in thrall to the eighteenth-century hypothesis that there are, in social behavior and in societal development, patterns which recur in the same way that they appear to recur in the physical universe. If the hypothesis is sound, it must follow that, once the relevant developmental sequences which have led us to our present state have been correctly analyzed,

proach necessarily has been consistent with the motto engraved outside the National Archives: "What is past is prologue."⁶²⁴ Having said that, I want to suggest a few goals for the future in lieu of a conclusion.

Courts, futurists themselves, are not without suggestions on how to cope with challenges that are coming.⁶²⁵ Having assessed the challenges to be encountered in the future, the Delphi Study offered a list of goals for those who will lead the courts into the future: (1) improve access to the judicial system; (2) divert classes of disputes to alternative dispute resolution and administrative agencies; (3) emphasize judicial management of dispute resolution; (4) reemphasize the courts' service ethos; (5) develop new initiatives in judicial education; (6) expand the lawyers' ability to practice law holistically and preventatively; (7) exemplify equal justice under the law; (8) develop improved methodology for dealing with scientific and technical issues; (9) increase the autonomy of courts

we will know not only where we are but where we are going. Our understanding of the present will enable us to predict the future and, within limits, to control it. Once the forces at work are known, they can be channeled or harnessed to serve the needs and wants not necessarily of mankind at large but at least of those who are in a position to manipulate them.

We have never had to face up to that frightening possibility for the excellent reason that no historian, social scientist, or legal theorist has ever succeeded in predicting anything. After two hundred years of anguished labor, the great hypothesis has produced nothing. The formulations proposed in each generation have collapsed when the realities of the following generation have become known. Nevertheless, the dream dies hard. Each new generation of investigators has convinced itself that the cause of past failure lay in inadequate methodology and that, with more refined techniques, the trick will finally be pulled off. The historians continue to ransack the archives. The sociologists continue to perfect increasingly complicated ways of carrying on their empirical studies. It is true that some economists, having observed the fate of all the theories put forward by their predecessors, have succumbed to skepticism and seem ready to go out of the long-term prediction business.

One lesson which we can draw from all this is that the hypothesis is itself in error. Man's fate will forever elude the attempts of his intellect to understand it. The accidental variables which hedge us about effectively screen the future from our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse. So far as we have been able to learn, there are no recurrent patterns in the course of human events; it is not possible to make scientific statements about history, sociology, economics—or law.

GRANT GILMORE, *THE AGES OF AMERICAN LAW* 99-100 (1977).

624. Cf. Nejelski, *supra* note 122, at 213 ("I have seen the future, and it works about as well as the past, but with some differences.").

625. See McConnell, *supra* note 14, at 1 (discussing study which solicited judges' opinions on what the courts must do to change with society).

and judges to innovate procedurally; (10) develop better substantive law; (11) improve public understanding and support for the courts; (12) develop partnerships with the legislative and executive branches for fostering reform and improvements; and (13) make better use of technology to modernize the courts.⁶²⁶

I will end by calling for an important "reality check," for me and for you. We must all appreciate that goals of court experts and insiders—even the best laid plans of judges and court commentators—are not always likely to become future political scenarios for two reasons. First, those who would design and implement these goals, judges and court administrators, for the most part, are obliged to act in the present, to deal responsibly with today's problems in terms of today's solutions. The people running the court system in the United States today resemble Alice in *Through the Looking Glass*: they are running as fast as they can to stay in the same place.⁶²⁷ Planning for the future and implementing needed reforms are activities that come at the end of a long day or on weekends.

Second, public preferences and political compromises tend to overtake even the most excellent government planning. We live in complex times when many social problems are competing for the time and attention of the people and their representatives. It is virtually impossible to capture the public attention for court reform. William H. Rehnquist is not going to be *asked* to appear on Oprah Winfrey's show.⁶²⁸

We must sustain and encourage each other. We must persevere.⁶²⁹ There is too much at stake to contemplate failure. This

626. Delphi Study, *supra* note 12, at 303-04.

627. Baker & Hauptly, *supra* note 459, at 107.

628. See Richard Morin, *Wapner v. Rehnquist: No Contest, TV Judge Vastly Outpolls Justices in Test of Public Recognition*, WASH. POST, June 23, 1989, at A21 (discussing Americans' lack of recognition of the individuals currently sitting on the Supreme Court while more Americans were aware of the judge presiding over "The Peoples' Court").

629. It was a great court reformer and state chief justice who coined the today commonplace observation that "judicial reform is no sport for the short-winded":

Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat. Rather we must recall the sound advice given by General Jan Smuts to the students at Oxford: "When enlisted in a good cause, never surrender, for you can never tell what morning reinforcements in flashing armor will come marching over the hilltop."

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION at xix (Arthur T. Vanderbilt ed., The Law Center of New York University for the National Conference of Judicial Councils, 1949).

then is the ultimate challenge facing the courts: to take the future "into evidence,"⁶³⁰ to plan for it effectively, and, most important, to sustain the bench and bar's commitment to the ideal of "Equal Justice Under Law."

630. See Delphi Study, *supra* note 12, at 306 (noting that the courts need to anticipate changing needs and change along with those needs).

